SUPREME COURT U.S.
FILED

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OFFICE OF THE CLERK

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF ALABASTER, et al.,

Petitioners,

v.

DONNA J. BEAULIEU

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit err in holding that claims challenging a municipal ordinance under the First Amendment, which were brought before the municipal authorities had a chance to issue a response or denial on the issue, were ripe for review.

2. Did the Eleventh Circuit err in holding that the City's Ordinance No. 03-010 is content-based regulation.

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ALABASTER, ALA., ORDINANCE No. 03-010 3-25

PETITION FOR A WRIT OF CERTIORARI

Petitioners the City of Alabaster, Alabama, a municipal corporation ("the City"), Mayor David Frings, the Alabaster City Council, Rick Walters as President of the Alabaster City Council, the City of Alabaster Police Department, and Police Officer Brian Brandenburg in his capacity as officer and employee of the Alabaster Police Department respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a-49a) is reported at 454 F.3d 1219. The order denying the petition for rehearing and for rehearing en banc (App. 50a-51a) is unreported. The memorandum opinion of the district court (App. 52a-83a) is reported at 338 F. Supp. 2d 1268.

JURISDICTION

The judgment of the United States Court of Appeals was issued on June 30, 2006, and the petition for rehearing and for rehearing en banc was denied on September 5, 2006. This Court has jurisdiction over this petition under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section II of the United States Constitution limits the jurisdiction of federal courts to *actual* cases and controversies, thereby, preventing federal courts from issuing opinions on abstract questions. See U.S. Const., art. I, §2.

The First Amendment provides, in pertinent part, that "Congress shall make no law... abridging the freedom of speech..." Id., amend. I.

STATEMENT

This case is about a citizen and district court's misunderstanding of a municipal sign ordinance and an

appellate court that adopted their misconception and strayed from its circuit's precedent.

Donna J. Beaulieu ("Beaulieu") is a practicing attorney with a law office located in the B-5 zoning district of the City of Alabaster, Alabama ("the City"). At said office, Beaulieu has an on-premise sign, attached to the front of the building, [***this is not the sidewalk sign***] which says, "Donna J. Beaulieu, Attorney at Law," for which she obtained a permit on or about September 26, 2003. App. 88a-101a. When this sign was applied for, Beaulieu was in no way asked what the content of the sign would be. Id. Specifically, no where in the sign permit application is the content of a given sign requested. Id.

The City's Zoning Ordinance consists of a primary ordinance and one that amends it.

> Alabaster is governed by a comprehensive Zoning Ordinance, ALABASTER, ALA., ZONING ORDINANCE No. 99-010

> ("the Zoning Ordinance"). The Zoning Ordinance consists of twelve articles addressing various topics, including among other things the Zoning Ordinance's stated purposes, review and appeal procedures, signs, and severability. Article X of the Zoning Ordinance deals specifically with signs in the City of Alabaster. On November 3, 2003, the Zoning Ordinance was amended by ALABASTER, ALA., ORDINANCE No. 03-010. ALABASTER, ALA., ORDINANCE No. 03-010 made amendments to both Article III and Article X of the Zoning Ordinance.

Id. It is the Building Official's job to review sign permit applications, and he must do so according to specific criteria. Id. Content is in no way a part of the criteria for issuing or denying a permit. Id. In turn, the Building Official's decisions are subject to the review of the Board of Adjustment. Id.

Beaulieu and the courts below have a fundamental

misunderstanding of the subject sign ordinance. The subject sign ordinance in no way discriminates political speech in favor of commercial speech. The City, per its Building Official, interprets the subject sign ordinance and its treatment of political speech relative to Beaulieu's zoning district in the following manner:

> ***Political signs are not banned from the B-5 zoning district.*** However, within a B-5 zoning district any sign posted must be permitted, as provided by Article X, Sections 2.1. and 8, regardless of the content of the sign. Therefore, the permitting requirement would apply equally to political signs as it does to other types of signs. ***The City does not distinguish signs which are subject to a permit on the basis of their content.***
>
> As a general rule of thumb, under Article X, Section 2.1., all signs within the City of Alabaster must be permitted prior to posting. There are, however, certain exceptions to the general permit requirement.

For example, Article X, Section 15.2., allows certain signs to be erected without a permit. ***One type of sign allowed without a permit are political signs in a residential zoning district that have been improved with a dwelling.*** This exception to the general permitting requirement is set forth in Article X, Section 15.2.E. It is my understanding that Ms. Beaulieu contends that Section 15.2.E.1. limits the location of political signs in the City of Alabaster strictly to residential zones. This is simply untrue. ***The sole purpose of the provisions of Section 15 are to allow for certain signs without requiring a permit.*** In other words, it gives them preferred status. Among the signs given this preferred status are political signs in a residential zoning district on property which is improved with a dwelling. In the complete context of Section 15, Section 15.2.E.1. should be read as "Political signs shall only be located in a residential zoning district on property which is improved with a dwelling" to be exempted from the permitting requirements set

forth in Article X.

Id. (emphasis added). The only time that political signs are specifically referenced, they are given preferential treatment by being exempted from the general permit requirement for all signs. Id.

The only sign permit application the City has ever received from Beaulieu was for the sign she has on the front of her office building. Id. However, Beaulieu did not submit a permit application for that sign prior to posting it on the front of her building. Id. Although she was in violation of the ordinance, the City did not punish Beaulieu once it discovered the violation. Id. Furthermore, the City's Building Official worked with her in getting the sign properly permitted. Id. Moreover, Beaulieu was not required to provide the content of her sign as part of the permitting process. Id. Notably, she was allowed to keep the sign posted until she received her permit and was not required to

remove it. Id.

Beaulieu admits placing a campaign sign that was a political sign on the ***sidewalks*** in front of her office on 122 Main Street (Highway 31, South) in Alabaster, Alabama. App. 102a-120a. The sign was six feet high and three feet wide. On June 18, 2004, Officer Brandenberg gave Beaulieu a warning or notice that she had ten (10) days to remove her sign because she had not received a permit. Id. She removed her sign voluntarily. Id. However, Officer Brandenberg does not have the knowledge and authority to speak for the City about its zoning ordinances and was simply mistaken in issuing her this warning or notice. App. 88 a-101a.

The ***only*** person charged with the duty and that has the authority to determine which signs comply with the City's zoning ordinances is the City's Building Official. Id. Even though Beaulieu had previously dealt with the City's Building Official on other zoning issues, including the sign attached to the front of her office building, she never received

a response or denial from the City's Building Official before fling her lawsuit. Id.

The lower courts got away from the issue in this case by focusing on some mythical sign on Beaulieu's office building. However, at no point in time did Beaulieu post a political message on her office, nor did she attempt to substitute a political message on her "Attorney at law" sign, nor did she make any written or verbal request to do so. This mythical sign which is the subject of the Eleventh Circuit's decision was hypothecated by the district court judge at trial and is not the issue in this case.

The notice or warning given to Beaulieu **was not** for the mythical sign which is the subject of the Eleventh Circuit's decision nor for the lawful political signs posted across the street from her office, but was given to her as a result of an upside-down V-shaped sign she posted on the ***sidewalk*** in front of her office ("sandwich board sign"). First, Beaulieu never requested permission or applied for a

permit to (a) put an additional sign at her office or (b) substitute a new sign for the existing permitted sign located on her office building and, therefore, was never denied a permit to erect any sign, whether it be political or commercial. Id. Secondly, Beaulieu did not substitute a new sign for a non-permitted real estate sign, which would be lawful under Article X, Sections 12.0 and 15.3.F.3, regardless of the content in the substitution. App. 121a-156a. These are the two methods in which a property owner can post signs in a B-5 zoning district. App. 88a-101a and 121a-156a.

Further, Officer Brandenberg was simply incorrect in giving Beaulieu a notice or warning stating that the sandwich board she place in front of her office was in violation of Article X, Section 15.2.E.1. Section 15.2.E.1. applies **only** to residential zoning districts and requires that, in a residential zoning district, a property owner may post a political sign without having to obtain a permit, as long as the property is improved with a dwelling. App. 88a-101a. Beaulieu's office

is not located in a residential zoning district but is located in a **B-5 zoning district**. Id. Therefore, Article X, Section 15.2.E.1 does not even apply to Beaulieu's property or to the mythical sign that is the subject of the Eleventh Circuit's decision. Id. However, Beaulieu's sandwich board was in violation of Article X, Section 8, of the Zoning Ordinance because it was ***on the sidewalk***. App. 121a-156a. Any sidewalk sign in a B-5 district would be in violation of Article X, Section 8, of the Zoning Ordinance. Id. Officer Brandenberg simply misstated the violation in his warning.

Under Article X, Section 2.7., whenever a sign owner is ordered to remove a sign, the sign owner has the right to appeal the order of removal to the Board of Adjustment. Id. When such appeal is made, the enforcement for removal *shall be suspended* pending a ruling from the Board. Id. Secondly, under Article III, Section 2.0., Beaulieu could have initiated a proposed change of the zoning regulations as they pertain to her property. Id.

Since Beaulieu never appealed the warning or notice given to her by Officer Branderberg as a result of the signs placed along U.S. Hwy 31, she did not take advantage of the administrative remedies available to her. Id. Furthermore, she never even spoke to the City Building Official about the warning and what she was being warned about. Id. In fact, she removed the sign voluntarily. App. 102a-120a.

The City never had the opportunity to investigate the matter and determine what the problem was in regards to Beaulieu's sidewalk sign. The content of the sign is of no consequence.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision that Beaulieu's claims are ripe for review conflicts with its precedent.

Pursuant to Article III of the Constitution, limiting the jurisdiction of federal courts to actual cases or controversies, the district court and the Eleventh Circuit were required to determine whether Beaulieu's claims were ripe

for review. See Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006). In its decision, the Eleventh Circuit recognized that the purpose of the ripeness doctrine is to "avoid entangling ourselves in abstract disagreements, and also to shield agencies from judicial interaction until an administrative decision had been formalized and its effects felt in a concrete way by the challenging parties." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006) (alteration and internal quotation marks omitted).

The Eleventh Circuit stated that "to determine whether a claim is ripe we must evaluate: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006) (alteration and internal quotation marks omitted). First, in determining that Beaulieu's claims were ripe under the fitness prong, the Eleventh Circuit conflicts with its prior decisions in National I and Digital Props., Inc. v. City of Plantation, 121 F.3d 586

(11th Cir. 1997). Secondly, in determining that Beaulieu's claims were ripe under the undue hardship prong, the Eleventh Circuit conflicts with its prior decision in Int'l Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979).

The Eleventh Circuit incorrectly rules that (1) Beaulieu's reliance on verbal statements by Officer Brandenberg regarding the application and interpretation of the ordinance and (2) the notice she received from Officer Brandenberg were sufficient to be conclusive responses or denials from someone with the knowledge and authority to speak for the City. Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006). In National I and Digital Props., 121 F.3d 586, the Eleventh Circuit dismissed claims challenging municipal ordinances "because the lawsuits were filed before the municipal authorities had rejected the permit applications." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006). The Eleventh Circuit distinguished those

two cases from Beaulieu's claims because the plaintiffs in those cases did not receive a conclusive response or denial from someone with authority to speak for the City on the issue. Id. However, the cases are not distinguishable in. Like those plaintiffs, Beaulieu **did not** obtain a conclusive response or denial from someone with the knowledge and authority to speak for the City regarding Ordinance No. 03-010.

In Digital Props., and National I the Eleventh Circuit held that "by relying on verbal and/or written statements by a City's 'assistant zoning technician' or 'zoning clerk,'" respectively, the plaintiffs' claims were not ripe because they did not meet the minimum obligation "to obtain a conclusive response from someone with the **knowledge and authority** to speak for the City." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006) (citing Digital Props., 121 F.3d 586 and National I). Officer Brandenberg does not equal anything more than an "assistant zoning technician" or

"zoning clerk." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006); see also Digital Props., 121 F.3d 586; see also National I.. Although his job, as the City's code enforcement official, may require him to have knowledge of the City's zoning ordinances, as say the job of a zoning clerk or technician would also require, Officer Brandenberg does not have the **knowledge and authority** to speak for the City about its zoning ordinances. App. 88a-101a.

On the other hand, Mr. Sims, the City's Building Official, is the **only** person charged with the duty and has the authority to determine which signs comply with the City's zoning ordinances and which do not. Id. Therefore, he is the **only** person with the authority to interpret and apply the City's zoning ordinances. Id. Consequently, Mr. Sims is the person with the knowledge and authority to speak for the City on the issues relevant to Beaulieu's lawsuit. Moreover, Beaulieu knew that Mr. Sims was the person to speak to regarding the City's sign ordinances because, on a prior

occasion, she had to work with him to get a permit for sign that she had posted on her office building. Id. On this prior occasion, she also learned that a violation of the sign ordinance does not mean the sign owner will be punished, but that if Mr. Sims deems there to be a violation he will help the sign owner come into compliance. Id.

If Beaulieu would have simply asked Mr. Sims, the City's authority on this issue and with whom she had dealt with before on a previous sign ordinance issue, then he could have explained that Article X, Section 15.2.E.1. did not apply to her property and that, secondly, there is no prohibition on political speech in the City's sign ordinance. App. 88a-101a and 157a-221a.

Furthermore, the notice is *not* conclusive or a *final decision* because the sign owner has the right to appeal the order of removal to the Board of Adjustment. Id. When such an appeal is made, the enforcement for removal shall be suspended pending a ruling from the Board of Adjustment.

Id. Therefore, she would not have had to remove any sign. However, Beaulieu neither appealed the notice, nor spoke to the Building Official about it. Id.

In determining that Beaulieu's claims were ripe under the undue hardship prong, the Eleventh Circuit conflicts with its prior decision in Int'l Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979). In Eaves, the Eleventh Circuit held that the plaintiffs demonstrated that they would suffer undue hardship if they were not allowed to adjudicate their claim in federal court and that there was an

> impending injury because the plaintiffs had a "specific, serious, and plausible" intent and desire to engage in the prohibited behavior and 'all that stood between the...plaintiffs and impending harm was their choice to modify their behavior to conform.

Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006) (internal citations omitted).

The Eleventh Circuit incorrectly held, like the plaintiffs in Eaves, Beaulieu had a

> specific, serious and plausible" intent and desire to engage in conduct that arguably would violate the ordinance [because she] very much wanted to post a campaign sign on her office property.

Id. First of all, Beaulieu never requested permission or applied for a permit to put an additional sign at her office nor did she substitute a different message on an existing permitted sign located on her office building and, therefore, was never denied a permit to erect any sign, whether it contained a political or commercial message. App. 88a-101a. Secondly, Beaulieu did not substitute a different message on a non-permitted real estate sign, which would be lawful under Article X, Sections 12.0 and 15.3.F.3, regardless of the content in the substitution. App. 88a-101a and 157a-221a. The Eleventh Circuit's decision is based on some sort of mythical sign and a 'zoning clerk's' mistaken interpretation of the ordinance.

Like the plaintiff in National I, "it would have been less difficult and would have taken less time for [Beaulieu] to

have obtained a final written denial... 'instead of rushing to the federal courts for relief.'" Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006) (quoting National I, 402 F.3d at 1341).

II. The Eleventh Circuit's decision that the City's Ordinance No. 03-010 is content-based regulation conflicts with its precedent.

The Eleventh Circuit's decision that the City's sign ordinance is content-based regulation conflicts with its previous decision in Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329 (11th Cir. 2005) ("National II"). The Eleventh Circuit stated they considered "the City's 'own authoritative construction of the ordinance, including its implementation and interpretation' and defer[ed] to that construction." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006). However, the Eleventh Circuit's decision does not follow the City's interpretation of its ordinance when it states the following:

> Although a substitution clause may turn an otherwise content-based regulation into a content-neutral, constitutional one, that is not the case here. Even if political signs can be substituted for real estate signs in the City of Alabaster, they are still not treated equally. Under the City's interpretation of its sign ordinance, a person who wants to post a real estate sign can simply post the sign on her property. But a person who wants to substitute a campaign sign for a real estate sign under [S]ection 12.0 must visit Alabaster City Hall, complete an application for the substitution, pay the permit fee, and wait at least a week for a response.
>
> In sum, under the sign ordinance it is easier, cheaper, and faster for Beaulieu to post a real estate sign than a campaign sign. Because political signs are subject to more regulatory burden than real estate signs, the sign ordinance discriminates against political speech in favor of commercial speech. It is content-based regulation.

Id. (internal citations omitted).

City Ordinance No. 03-010 amended both Articles III and Article X of the City's comprehensive Zoning Ordinance No. 99-010. App. 88a-101a and 157a-221a. One of the amendments made by Ordinance No. 03-101 to Article X is a substitution clause found in Section 12.0. Id. Dr. Kelly, drafter

of this clause, testified directly on this point stating that "the intent was that the substitution message language would let someone take even a real estate sign and place a political message on it" and that it was the intent that "the substitution of message language would apply broadly." App. 157a-221a. Therefore, the intent of the clause in the amendment was to insure that any and all speech would be treated equally in the City's sign ordinance. Id. Article X, Section 12.0, allows a sign owner to substitute the message on a lawful existing sign. App. 88a-101a and 157a-221a. If the existing sign required a permit prior to posting, then the substitution sign would as well, regardless of content. Id. Furthermore, if the existing sign *did not* require a permit prior to posting, then the substitution sign would not require a permit either, regardless of content. Id.

In National II the Eleventh Circuit held that "National's challenge to Miami's zoning ordinance was rendered moot by the subsequent amendment of the ordinance to include a substitution clause." Beaulieu v. City of Alabaster, 454 F.3d

1291 (11th Cir. 2006) (quoting National II, 402 F.3d at 1330). The substitution clause in National II is virtually identical to the substitution clause in Article X, Section 12.0, as amended by Ordinance 03-010. See National II, 402 F.3d at 1335 and App. 121a-156a. In National II, the Eleventh Circuit stated that "the amendments 'made clear that non-commercial messages would be permitted anywhere commercial messages were allowed' and remedied any constitutional problems with the ordinance." Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006) (quoting National II, 402 F.3d at 1335). Just like the City of Miami in National II, the City of Alabaster also permits noncommercial messages anywhere commercial messages are allowed.

According to the City's interpretation of their sign ordinance, including the substitution clause, within a B-5 zoning district, the location of Beaulieu's office, there are four ways Beaulieu can post the mythical sign in the panel decision: (1) apply for a permit to post an additional sign on

her property under Sections 2.1 and 2.8; (2) apply for a permit to substitute the existing permitted sign on her office building with an new sign under Sections 21., 2.8 and 12.0; (3) substitute the message on an existing lawful sign with a new message under Section 12.0; or (4) she can post a "real estate" sign on her property, under Sections 15.3.F.3 and 12.0, and substitute any commercial language that would normally be in a real estate sign for whatever noncommercial speech, including political speech, she wants to without having to obtain a permit. App. 88a-101a and 121a-156a. As one can see, noncommercial speech, including political speech, is ***not*** subject to more regulatory burden than commercial speech, including real estate signs, therefore, the City's sign ordinance ***does not*** discriminate against political speech in favor of commercial speech, contrary to the panel decision. Beaulieu v. City of Alabaster, 454 F.3d 1291 (11th Cir. 2006).

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Respectfully Submitted,

/s/ James W. Porter, II
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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

DONNA J. BEAULIEU, PLAINTIFF-APPELLEE,

V.

ALABASTER, CITY OF, a municipal corporation, DAVID FRINGS, Mayor of City of Alabaster, ALABASTER CITY COUNCIL, by and through its president, Rick Walters, CITY OF ALABASTER POLICE DEPARTMENT, BRIAN BRANDENBERG, DEFENDANTS-APPELLANTS.

DOCKET NO. 04-16230-BB.

ARGUED: DECEMBER 16, 2005.
DECIDED: JUNE 30, 2006.

Before: CARNES, HULL and PRYOR, Circuit Judges.

CARNES, Circuit Judge:

Donna J. Beaulieu is a practicing attorney with a law office in the City of Alabaster, Alabama, a suburban community about seventeen miles south of downtown Birmingham. Her office building is located in the central business district, also known as the B-5 zoning district, and faces U.S. Highway 31, the main commercial thoroughfare

that runs through Alabaster's downtown. Beaulieu has a permanent sign on the front of the building that says, "Donna J. Beaulieu, Attorney at Law." The City issued her a permit for the sign in September of 2003.

This case does not involve that sign, at least not directly. It involves another sign that Beaulieu put up on the same property, a political sign urging support for her candidacy for a state judgeship. As a result of that additional sign, Beaulieu was served by the City of Alabaster's code enforcement officer with written notice that she had violated the City's sign ordinance, a notice which gave her ten days to correct the violation "to avoid any further legal action." She sued, and this is the City's appeal from the district court's judgment in her favor. Before we set out the details of the sign ordinance, recount the procedural history of the case, and get into the legal issues, we need to set out the facts that led to the lawsuit.

I.

On April 2, 2004, Beaulieu qualified to run as a candidate for circuit judge in Shelby County, Alabama in the November 2, 2004 general election. She put a campaign sign on the sidewalk in front of her office. It was a stand-alone, upside-down "V"-shaped sign about six feet high and three feet wide with two smaller "Donna J. Beaulieu for Circuit Judge" signs on both sides of it. She did not apply for or obtain a permit for the sign.

On June 18, 2004, Brian Brandenberg of the Alabaster Police Department delivered a notice to Beaulieu's office, informing her that the campaign sign was in violation of section 15(E)(1) of the City's sign ordinance. As the City's code enforcement officer, Brandenberg was "familiar" with the sign and zoning ordinances because "it [was his] job to enforce them." The notice stated:

> It has come to the attention of the city that your business is displaying a political sign on your property. This is a violation of the Sign

> Ordinance with the city of Alabaster. The Sign Ordinance states that political signs may only be displayed in a residential zoning district on property which is improved with a dwelling. This letter serves as a ten (10) calendar day notice to correct these things to avoid any further legal action.

Ten days after receiving that notice, Beaulieu removed the campaign sign. She was never formally charged with a violation of the ordinance, and did not file an appeal with the Board of Adjustment.

Thereafter, Beaulieu's husband and campaign manager, Henri N. Beaulieu, Jr., paid a visit to Alabaster City Hall to obtain a copy of the sign ordinance. While waiting for the copies, Mr. Beaulieu talked with Officer Brandenberg, who happened to be standing at the counter. Brandenberg told Mr. Beaulieu that his wife's campaign signs were posted on trees throughout the city and needed to be removed because they violated the sign ordinance.

What else was said is disputed. According to Mr. Beaulieu's affidavit, he asked Brandenberg if he would be

breaking the law if he removed the "Donna Beaulieu, Attorney at Law" sign from the front of the his wife's office building and replaced it with a "Donna Beaulieu for Judge" sign of the same dimensions. Mr. Beaulieu's affidavit states that Brandenberg told him that such a substitution would be a violation of the ordinance, and when he expressed the opinion that the ordinance was "un-constitutional, it is content-based" and that his wife would have to file a lawsuit to get an injunction, Brandenberg replied: "Get in line." Brandenberg, on the other hand, states in his affidavit that he does not recall Mr. Beaulieu asking him specifically about substituting a campaign sign for the attorney-at-law sign already on the front of the building, but says that "I certainly did not tell him that a substituted message would not be allowed."

II.

The procedural history of the case and our discussion of the district court's decision will be easier to understand if we precede them with a detailed description of Alabaster's

sign and zoning ordinances.

Alabaster's comprehensive zoning ordinance was enacted for the purpose of promoting health, safety, morals and general welfare." See Alabaster, Ala., Zoning Ordinance 99-010, Art. II, § 1.0 (Sept. 21, 1999). It consists of twelve articles. See generally id. Article VI divides Alabaster into twenty zoning districts, one of which is the B-5 district or central business district. Id. Art. VI. Article III focuses on administrative procedures and zoning, while Article X deals with signs. Id. Arts. III, X.

On November 3, 2003, the Alabaster City Council adopted a sig n ordinance, which amended Article III and Article X of the zoning ordinance. See Alabaster, Ala. Ordinance 03-010 (Nov. 3, 2003). The sign ordinance, which took effect on January 1, 2004, includes among its stated purposes: promoting aesthetics and pedestrian and traffic safety; reducing visual clutter; ensuring that residents are able to "have the opportunity to express their views on public

issues through signs located at their residences"; and ensuring that "persons seeking housing in Alabaster can easily find available housing by allowing commercial real estate signs in locations and circumstances where other commercial signs are not allowed." Id. § 1.1 (4), (5), (9), (10), amending Article X of Ordinance 99-010.[1]

The sign ordinance generally requires a permit from "the Building Official" before a sign is erected or altered. Id. § 2.1. Anyone seeking a permit must submit an application with a drawing showing, among other things, the location and dimensions of the sign. Id. § 2.2. The application must also be accompanied by a fee "as specified by the Building Official for each sigh in accordance with this Ordinance." Id. § 2.5. Within seven days of the submission of a completed

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[1] The record does not include an updated version of the zoning ordinance complete with the amendments from the sign ordinance. Unless otherwise noted, we will cite to the sections as they should appear when incorporated into Article X of the zoning ordinance as amended.

application, the Building Official must either issue or deny the permit. Id. § 2.3. In the B-5 zoning district, where Beaulieu's office is located, property owners or tenants may obtain a permit for one sign "per facing street" for "[b]usiness or other use." Id. § 8.0(A)(1). The sign may be a "building wall sign, canopy sign, or projecting sign" and must not exceed a certain size. Id. §§ 8.0(A)(2), (3)(a)–(b).

The sign ordinance allows some types of signs, including temporary real estate signs and political campaign signs, to be erected without a permit subject to certain conditions. [2] Id. §§ 15.2(E), 15.3(F)(3). "Each commercial

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[2] The sign ordinance states that an "[a]pplication for a permit...to erect a temporary sign...shall be made to the Building Official," and it requires that the application for a temporary sign shall include "the date on which the sign will be erected and the date when the sign shall be removed." Id. § 2.2, (E). The City did not, however, argue to the district court that permits were required for temporary real estate signs. The district court, without any objection from the City that we can find, interpreted the sign ordinance as allowing temporary real estate signs without a permit.

Likewise, in neither of its briefs to this Court did the City argue that the district court erred in its finding that the

lot, building or tenant space may have one real estate 'for sale' or 'for rent' sign, provided such sign is located on the subject lot or premises" and does not exceed the size limitations. Id. § 15.3 (F)(3). Real estate signs must be removed when the property is sold or rented. Id. This is what the ordinance says, in pertinent part, about political campaign signs:

> The following signs shall be allowed, subject to the following conditions, but no sign permit

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sign ordinance allowed temporary real estate signs without a permit. During oral argument we gave the City a number of opportunities to make that argument; instead of doing so, the City seemed to concede that the ordinance did allow temporary real estate signs without a permit. We will not force an argument on a party and assert for it a position it did not take in the district court or this Court. See Irving v. Mazda Motor Corp., 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff failed to make this argument in the district court, we decline to consider it here."); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1511 n.30 (11th cir. 1996) (This Court "will not address claims or arguments not fairly presented to the district court."); United States v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001) ("[O]ur well established rule is that issues and contentions not timely raised in the briefs are deemed abandoned."); United States v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001) ("[W]e apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.").

shall be required for such signs:

E. Political campaign signs, subject to the following:

1. Political signs shall only be located in a residential zoning district on property which is improved with a dwelling.

Id. § 15.2(E)(1).

The sign ordinance also contains a section captioned "Substitution of Messages." Id. § 12.0. It provides that any sign allowed under the ordinance "may contain, in lieu of any other message or copy, any lawful noncommercial message...so long as said sign complies with the size, height, area and other requirements of this Ordinance." Id.

If a person wishes to erect a sign that is not allowed in a particular zoning district, he may, after receiving approval from the Board of Adjustment, apply for a "special exception use." See Ordinance 99-010, Art. III, § 3.2. The application, along with a $100 non-refundable fee, must be submitted to the Building Official at least eighteen days prior to the Board of Adjustment meeting at which the request is to be

considered. Id. § 3.2(A).

A section of the sign ordinance captioned "Unlawful signs" requires signs to be maintained in sound structural condition. Ordinance 03-010 § 2.7. It authorizes the Building Official to inspect all signs and order the painting, repair, alteration, or removal of any sign that does not comply with the Building Code. Id. The owner of a sign or of the property on which it is located may appeal a removal order to the Board of Adjustment. Id. An appeal suspends enforcement of the order until the Board issues a ruling. Id. The ordinance also authorizes appeals from the denial of a "building permit" by the Building Official. Id. § 2.4. A provision in the zoning ordinance, captioned "Appeals From a Decision of the Board," provides for appeals from decisions of the Board of Adjustment to the circuit court. See Ordinance 99-010, Art. III, § 3.5.

III.

On July 19, 2004, Beaulieu filed a complaint in the

district court against the City of Alabaster, Mayor David Frings, City Council President Rick Walters, the City of Alabaster Police Department, and Officer Brandenberg. Because they all take the same position in this case, we will refer to the defendants collectively as "the City."

Beaulieu's complaint requested a declaratory judgment and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202. It challenged the sign ordinance under 42 U.S.C. § 1983, claiming that it was facially unconstitutional because: (1) it places an undue burden on free speech; (2) it is a content-based regulation because it favors commercial speech over non-commercial speech; (3) it is not justified by a compelling government interest; and (4) even if applied in a content-neutral fashion, "[i]t is not narrowly tailored to further a substantial governmental interest and ample alternative means for communicating the desired message do not exist." The complaint also claimed that the sign ordinance was unconstitutional as applied to Beaulieu because it violated her

First Amendment right to free speech.[3] Following a hearing, the district court entered an order on July 26, 2004, denying preliminary injunctive relief.

Thereafter, the City filed its Brief in Opposition to Plaintiff's Claims for Declaratory and Injunctive Relief, in which it made a number of arguments. One was that Beaulieu's claims were barred because she had never filed an appeal with the Board of Adjustment and therefore had failed to exhaust her state administrative remedies.

The City also argued on the merits that its sign ordinance was constitutional on its face and as applied to Beaulieu. In support of its position, the City submitted the affidavit of Steven Sims, the City's Building Official. Sims gave his view that political signs are not banned from the B-5 zoning district but that property owners in that zone must

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[3] Beaulieu's complaint contained other legal theories but she abandoned them before the district court entered its order.

obtain a permit for a political sign, as they would for most other signs. He said that the permit requirement applies equally to all signs regardless of their content and that permits are issued without regard to content. He noted that the sign ordinance does exempt some signs from the permit requirement, including political signs posted on property in a residential zoning district if that property has a dwelling on it.

During the bench trial on August 31, 2004, the City's introduced the testimony of Dr. Eric Kelly, the drafter of the sign ordinance. Dr. Kelly agreed with Sims' interpretation of the sign ordinance but conceded that the ordinance was unclear and "ought to be fixed." As for section 12.0, he said that the intent was that the substitution message provision would "apply very broadly" and "would let someone take even a real estate sign and place a political message on it." Kelly admitted "[t]hat would be sort of an unusual scenario," though.

On September 24, 2004, the district court entered a

final judgment in favor of Beaulieu. Beaulieu v. City of Alabaster, 338 F. Supp. 2d 1268, 1278-79 (N.D. Ala. 2004). In a memorandum opinion the court concluded that Beaulieu's claims were not barred because of her failure to appeal administratively, "because the exhaustion of state administrative remedies is not a prerequisite to filing suit under 42 U.S.C. § 1983." Id. at 1272 (citing Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla., 351 F.3d 1112, 1118, n.5 (11th Cir. 2003)).

The court then addressed whether the two elements of a § 1983 action were present: "(1) whether conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Beaulieu, 338 F. Supp. 2d at 1273 (quoting Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908 (1981)) (internal quotation marks omitted). The court found that Beaulieu had established the first element because the

sign ordinance was enacted pursuant to the City's municipal authority, and Officer Brandenberg had acted under color of state law when he "cited" Beaulieu for violating the ordinance. Id.

With regard to the second element, the district court first decided that the ordinance was content-based and therefore subject to strict scrutiny. See Beaulieu, 338 F. Supp. 2d at 1273-78. In doing so, the court rejected the City's position that political signs were allowed in the B-5 zoning district via the section 12.0 substitution provision, because that position "does not comport with the clear language of section 15.2(E)(1)...nor with the manner in which the City enforced the ordinance." Id. at 1275. The court pointed out that the City's litigation position regarding this provision was undermined by the fact that Sims and Brandenberg, who were both "supposed to know and understand the ordinance," had conflicting interpretation of it. Id.

This district court next examined whether section

15.2(E)(1) violated Beaulieu's First Amendment right to political expression by restricting political campaign signs in the B-5 zoning district. Beaulieu, 338 F. Supp. 2d at 1275. The court reasoned that even taking the substitution provision into account, the sign ordinance still burdened core political speech because in order to display a temporary political sign via substitution, speakers in the B-5 zoning district would have to completely or partially cover up a pre-existing commercial sign announcing the location of their business. Id. at 1276 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47, 115 S. Ct. 1511 (1995)). The court called this "a proverbial 'Hobson's choice.'" Id. Because section 15.2(E)(1), on its face and as applied, burdened Beaulieu's right to political speech, the court applied strict scrutiny review. Id. It concluded that the City's interests in the promotion of aesthetics and traffic safety, although substantial, were "not sufficiently overriding" to satisfy that heightened level of scrutiny. Id. at 1277.

Alternatively, the court concluded that section 15.2(E)(1) was a content-based restriction on political speech. Beaulieu, 338 F. Supp. 2d at 1277 (citing Sugarman v. Village of Chester, 192 F. Supp. 2d 282, 300 (S.D.N.Y. 2002)). It found that the ordinance favored commercial speech over political speech because it allowed temporary real estate signs to be displayed in the B-5 zoning district without a permit, but did not allow temporary political signs at all, unless they were substituted for a commercial sign. Id. at 1277-78. The court noted that a business owner could simultaneously display one commercial sign with a permit and one "for sale" sign without a permit, but Beaulieu would not be able display both her "Attorney at Law" sign and her temporary campaign sign. Id. The court saw no overriding or compelling state interest that justified this content-based treatment of political signs. Id. at 1278.

As for remedies, the district court enjoined the City from enforcing what it interpreted to be section 15.2(E)(1)'s

restriction of political signs to residential property improved with a dwelling. Beaulieu, 338 F. Supp. 2d at 1279. It also ordered the City of treat political signs in the B-5 zoning district the same as temporary real estate signs. Id. In other words, the court ordered the City to allow each business in the B-5 zoning district to erect one temporary political sign without a permit, just as it had always been allowed to erect one temporary real estate sign without a permit. Id. The court held that pursuant to a severance clause, the court's order did not affect the validity of any other portion of the ordinance. Id.

IV.

The City contends that the district court erred in finding that Beaulieu's claims were ripe for review in federal court because, it says, she failed to exhaust her administrative remedies. Of course, we review questions of subject matter jurisdiction de novo. Justice Cometh, Ltd. v. Lambert, 426 F.3d 1342, 1343 (11th Cir. 2005).

Specifically, the City argues that Beaulieu's claims are not ripe because she: (1) bypassed Alabaster's administrative appeals process and failed to show how the appeals process would have harmed her; and (2) improperly relief on the statements of Officer Brandenberg to determine what the sign ordinance did and did not allow and failed to obtain a "conclusive response from someone with the knowledge and authority to speak for the City" regarding its ordinance. See Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 590 (11th Cir. 1997).

Beaulieu responds that under Patsy v. Board of Regents of Florida, 457 U.S. 496, 102 S. Ct. 2557 (1982), and Granite State, 351 F.3d 1112, the exhaustion of state administrative remedies is not a prerequisite to filing suit under § 1983. She also argues that even if exhaustion is a prerequisite, it would have been futile for her to file an appeal with the Board of Adjustment because the sign ordinance clearly relegates political signs to residential areas, as the June

18, 2004 notice Brandenberg delivered to her confirms. Beaulieu further asserts that she was discouraged from appealing by Officer Brandenberg's statement to her husband that the City would not allow a substitution of a campaign sign for her "Attorney at Law" sign.

Alternatively, Beaulieu contends that if she had applied for and had been given a permit for a campaign sign pursuant to the section 12.0 substitution provision, her First Amendment rights would have been harmed. Her reasoning is that sharing or replacing her "Attorney at Law" sign with a campaign sign would have caused her to suffer a loss of business advertising space. She also argues that she should not have been required to apply for a permit for a political sign since she would not have had been required to apply for one for a real estate sign.

The Supreme Court and this Court have held that there is no requirement that a plaintiff exhaust his administrative remedies before filing suit under § 1983. Patsy, 457 U.S. at

516, 102 S. Ct. at 2568; Greenbriar Ltd. v. City of Alabaster, 881 F.2d 1570, 1574 n.8 (11th Cir. 1989) (citing Patsy). On the basis of those decisions, the district court held that Beaulieu could bring a First Amendment challenge to the sign ordinance pursuant to § 1983 without first exhausting her administrative remedies. Beaulieu, 338 F. Supp. 2d at 1272. Still, Beaulieu's claim must meet constitutional ripeness requirements. See Digital Props., 121 F.3d at 591 n.4 ("Even if we assume, however, that the Supreme Court's decision in Patsy v. Board of Regents, 457 U.S. 496, 102 S. Ct. 2557 (1982), precludes imposing an exhausting requirement on a First Amendment facial challenge to an ordinance under 42 U.S.C. § 1983, Digital still faces the ripeness hurdle."); see also Greenbriar, 881 F.2d at 1574 n.8 ("The question whether administrative remedies must be exhausted is conceptually distinct...from the question whether an administrative action must be final before it is judicially reviewable.") (quoting Williamson County Reg'l Planning Comm'n v. Hamilton

Bank of Johnson City, 473 U.S. 172, 192, 105 S. Ct. 3108, 3119 (1985)) (internal quotation marks and alteration omitted). We therefore address whether Beaulieu's claim is ripe for review.

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies and requires us to consider whether a plaintiff's claims are ripe. U.S. Const. Art. III, § 2, cl. 1; Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808, 123 S. Ct. 2026, 2030 (2003) ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction..."); see also Konikov v. Orange County, Fla., 410 F.3d 1317, 1322 (11th Cir. 2005). The ripeness doctrine keeps federal courts from deciding cases prematurely. Digital Props., 121 F.3d at 589. It "protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." Id.; see also Konikov, 410 F.3d at 1322 ("The purpose of this

doctrine is to avoid entangling ourselves in abstract disagreements, and also to shield agencies from judicial interaction until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (alternation and internal quotation marks omitted). "Courts must resolve...whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court." Digital Props., 121 F.3d at 589 (internal quotation marks omitted).

To determine whether a claim is ripe we must evaluate: (1) the fitness of the issues for judicial decision"; and (2) "the hardship to the parties of withholding court consideration." Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1315 (11th Cir. 2000) (internal quotation marks omitted). In applying the fitness and hardship prongs we must consider the following factors: "(1) whether delayed review would cause hardship to

the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733, 118 S. Ct. 1665, 1670 (1998); see also Ala. Power Co. v. Fed. Energy Regulatory Comm'n, 685 F.2d 1311, 1315 (11th Cir. 1982) (listing four similar factors).

Because this case involves all alleged violation of the First Amendment, our review of this suit's ripeness is as its most permissive. Digital Props., 121 F.3d at 590 ("[T]he injury requirement is most loosely applied when a plaintiff asserts a violation of First Amendment rights based on the enforcement of law, regulation or policy."); Cheffer v. Reno, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("[T]he doctrine of ripeness is more loosely applied in the First Amendment context."); Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 760 (11th Cir. 1991) ("The injury

requirement is most loosely applied – particularly in terms of how directly the injury must result from the challenged governmental action – where [F]irst [A]mendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced."). We have stated that "[t]he broader the First Amendment right and, therefore the more likely it is that a governmental act will impinge on the [F]irst [A]mendment, the more likely it is that the courts will find a justiciable case when confronted with a challenge to the governmental act." Id. at 762 n.5 (citing Solomon v. City of Gainesville, 763 F.2d 1212 (11th Cir. 1985); Int'l Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979) (both allowing facial attacks on ordinances of general application)).

This case involves the broadest of First Amendment rights because it concerns the right of a political candidate to publicize her candidacy during the heat of a campaign. McIntyre, 514 U.S. at 346, 115 S. Ct. at 1518 ("[T]he category

of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment: [d]iscussion of public issues and debate on the qualifications of candidates...") (internal quotation marks omitted); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223, 109 S. Ct. 1013, 1020 (1989) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal quotation marks omitted); Buckley v. Valeo, 424 U.S. 1, 14, 96 S. Ct. 61, 632 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (alteration and internal quotations omitted); Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002) ("A candidate's speech during an election

campaign occupies the core of the protection afforded by the First Amendment.") (internal quotation marks omitted); Fed. Election Comm'n v. Public Citizen, 268 F.3d 1283, 1287 (11th Cir. 2001) ("Discussing candidates' qualifications and advocating their election or defeat is pure political speech that occupies the core of the First Amendment's protection."). But even though we must apply the ripeness requirement loosely, we may not disregard it altogether. Nat'l Adver. Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005) ("National I") ("[W]hiles it is true that our review of a suit's ripeness is as its most permissive in cases concerning putative violations of the First Amendment, that requirement may not be ignored.") (internal citation omitted).

The City urges us to look to two ripeness cases in which this Court dismissed plaintiff's challenges to municipal ordinances because the lawsuits were filed before the municipal authorities had rejected the permit applications. See National I, 402 F.3d 1335; Digital Props., 121 F.3d 586.

Those cases were different, because unlike the present one, they did not involves core political speech. Digital Properties involved speech of a sexually explicit nature, 121 F.3d at 587-88, while National I involved commercial speech, 402 F.3d at 1337. See R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 422, 112 S. Ct. 2538, 2564 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expresssion.") (Steven, J., joined by White and Blackmun, JJ., concurring in the judgment); Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528, 1530 (11th Cir. 1985) ("[C]ommercial speech does not receive the same degree of constitutional protection as other forms of constitutionally guaranteed expression, and the former may be forbidden and regulated in situations where the latter may not be."). Even putting aside the difference in the type of speech

involved, Digital Properties and National I are still distinguishable.

Digital Properties had plans to open an adult book and video store in the City of Plantation, Florida, and entered into a contract to purchase a building. Digital Props., 121 F.3d at 587-88. The City's master list of business uses did not expressly indicate whether adult book or video stores were permitted or prohibited in the zoning district in which the building was located. Id. at 588. In an effort to obtain a building permit, Digital's architect and counsel were to city hall to file remodeling plans. Id. The technician told them that the City did not allow such a use or that the City's Code did not expressly permit such a use in that zoning district and advised them to speak with the director of building and zoning; they left without doing so. Id. at 588-89.

We stated that even assuming that the "zoning scheme could potentially hamper Digital's First Amendment rights," there was no subject matter jurisdiction to decide whether it

did, because Digital "did not pursue its claim with the requisite diligence to show that a mature case or controversy exists." Digital Props., 121 F.3d at 590. We noted that Digital's agents spoke only with one non-supervisory employee before concluding that the ordinance would prevent it from carrying out its plans for the building. Id. We stated that "[a]t a minimum, Digital had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme to Digital's proposal." Id.

In the other cases, National Advertising, a billboard company, applied for permits to erect billboards in a commercial zoning district in the City of Miami. National I, 402 F.3d at 1337-38. City zoning clerks declined to issue the permits because the billboards National wanted to put up would exceed the height limits in the City's sign ordinance. Id. A clerk also told National's agents that billboards were not permitted in the district. Id.

We affirmed the district court's grant of summary judgment to the City on ripeness grounds. National I, 402 F.3d at 1341. First, we found that the issues were not yet fit for judicial decision. Id. at 1339-40. We reasoned that National, like Digital, never pursued its claim through the administrative process available under the ordinance. Id. Because National had failed to obtain a final denial of its applications, its claim was not ripe. Id. at 1340. We stated that National had the obligation "to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme" to the plaintiff's permits. Id. (internal quotation marks omitted). A zoning clerk's verbal statement or written notation on an application that the proposed billboards were "too tall" or "in the wrong zone" is not conclusive evidence of a denial and does not present a dispute of sufficient concreteness for judicial review. Id.

As for the second prong of the ripeness test, we found

that National had failed to show that it would sustain undue hardship if the claim were not adjudicated. National I, 402 F.3d at 1341. We believed that it would have been less difficult and would have taken less time for National to have obtained a final written denial of its application "instead of rushing to the federal courts for relief." Id. For those reasons, we affirmed the district court's entry of summary judgment in favor of the City. Id.

Beaulieu's situation is different from that of National and Digital, because Beaulieu had a lot more than a verbal statement from a clerk or a written notation a clerk made on a permit application. Cf. National I, 402 F.3d at 1340. Instead, she had a written notice of violation from Officer Brandenberg, the City's code enforcement officer, a person who had authority to speak for the City regarding the application of its ordinance and who she had every reason to believe was knowledgeable about it. Cf. id. The notice could not have been more clear. It informed Beaulieu that her

campaign sign was in violation of section 15.2(E)(1) because "political signs may only be displayed in a residential zoning district on property which is improved with a dwelling," and it gave her ten days to correct the violation or face "further legal action." The notice was sufficiently conclusive and authoritative to meet the first prong of the ripeness test. Unlike the claims of National and Digital, Beaulieu's claims are fit for judicial decision.

Turning to the second prong, Beaulieu has also demonstrated that she would have sustained undue hardship if the district court had withheld adjudication of her claim. On this point we consider the situation of the plaintiffs in Eaves, 601 F.2d 809.[4] They wanted to solicit donations from passersby in various parts of the Atlanta airport, as they had done before the adoption of a municipal ordinance requiring

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[4] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit that were rendered prior to October 1, 1981.

solicitors to accept donations only at designated booths. Id. at 817. Because the plaintiffs obeyed the new ordinance, the City of Atlanta did not take any enforcement actions against them. See id. Nonetheless, this Court found that there was an impeding injury because the plaintiffs had a "specific, serious, and plausible" intent and desire to engage in the prohibited behavior and "[a]ll that stood between the...plaintiffs and impeding harm was their choice to modify their behavior to conform." Local 2238, 922 F.2d at 762 (discussing Eaves).

Moreover, we found in Eaves that it was likely that had the plaintiffs violated the ordinance, the City would have enforced it against them. Eaves, 601 F.2d at 821. Because the ordinance had been enacted only months earlier, we felt entitled to assume that "law enforcement agencies will not disregard such a recent expression of the legislature's will." Id. at 821. We also found that there would be no benefit to waiting until the factual record was more developed because the record was already sufficient. Id. at 821-22.

Like the Eaves plaintiffs, Beaulieu had a "specific, serious, and plausible" intent and desire to engage in conduct that arguably would violate the ordinance. See Local 2238, 922 F.2d at 762 (discussing Eaves). Beaulieu very much wanted to post a campaign sign on her office property, a practice that, according to the written notice of violation she had received from the City's code enforcement officer, was prohibited by the ordinance. The "further legal action" that the notice threatened would have been especially harmful to Beaulieu because there are some voters who probably would prefer to elect judges who have not been accused of violating the law.

The only thing that prevented the threatened harm was Beaulieu's modification of her behavior to conform to the requirements of the ordinance. See Local 2238, 922 F.2d at 762. If she had not knuckled under, the City likely would have taken the "further legal action" threatened in the written notice that its code enforcement officer had served on her.

Additionally, because the ordinance was adopted only seven months before this dispute arose, we may assume that city officials would not have disregarded the will of the City Council as expressed in the ordinance. See Eaves, 601 F.2d at 821. Nor was there any benefit to be gained from waiting for further development of the factual record because the City's views on the meaning of the sign ordinance and its application of the ordinance are already in the record. See id. at 821-22.

Finally, there is one more reason why Beaulieu would have suffered substantial hardship if her claim had not been adjudicated sooner instead of later. She was a candidate for political office. Every day that went by without her political signs up was a lost day of political advertising for her. She sued while her campaign for office was ongoing. She got relief in the form of a permanent injunction before the election. If she had waited for more definitive word from the City, she would have lost the benefit of having her sign up during the latter part of her campaign. For all of these

reasons, we conclude that Beaulieu's claim satisfies both prongs of the ripeness test.

V.

The City contends that, even if the claim was ripe for decision, the district court should have abstained on prudential grounds from deciding the case. We review only for abuse of discretion a district court's decision whether to abstain. Lops v. Lops, 140 F.3d 927, 942 n.21 (11th Cir. 1998).

The Supreme Court and this Court have held that federal courts should abstain from deciding a case when doing so would interfere with a state criminal proceeding or a state civil or administrative proceeding that is akin to a criminal one. See e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 436-37, 102 S. Ct. 2515, 2523-24 (1982) (state bar disciplinary proceedings); Rizzo v. Goode, 423 U.S. 362, 380, 96 S. Ct. 598, 608-9 (1976) (internal disciplinary affairs of municipal and police agencies); Huffman v. Pursue, Ltd., 420 U.S. 592, 604, 95 S.

Ct. 1200, 1208 (1975) (state nuisance proceedings); Younger v. Harris, 401 U.S. 37, 53-54, 91 S. Ct. 746, 755 (1971) (state criminal proceedings); Luckey v. Miller, 976 F.2d 673, 674, 677-78 (11th Cir. 1992) (state indigent defense system).

In the present case there are no state criminal, civil, or administrative proceedings underway. Any such proceedings ended when Beaulieu removed her campaign sign from the front of her office. Because there is no risk that a federal injunction would interfere with any pending state proceedings, the district court was not required to abstain from deciding the case.

VI.

Turning to the merits, the City contends that the district court erred in holding that section 15.2(E)(1) is a content-based restriction on speech that does not survive strict scrutiny. The City argues that the court should have deferred to its construction of the sign ordinance and under that construction, it is a content-neutral time, place, and manner

regulation.

We "decide de novo any legal issues relating to the constitutionality of a city ordinance." Joel v. City of Orlando, 232 F.3d 1353, 1357 (11th Cir. 2000). We must construe any ambiguity in the ordinance "in a manner which avoids any constitutional problems." Southlake Prop. Assocs. Ltd. v. City of Morrow, Ga., 112 F.3d 1114, 1119 (11th Cir. 1997). In doing so, we consider the City's "own authoritative construction of the ordinance, including its implementation and interpretation" and defer to that construction "so long as its interpretation is based on a permissible construction." Id.

Under the City's construction, the sign ordinance allows political signs to be erected in the B-5 zoning district (the central business district), where Beaulieu's office is located, as long as a permit is first obtained for the signs. It argues that section 15.2(E)(1) does not ban political signs on B-5 property; instead, it exempts political signs from the permit requirement as long as they are posted on residential

property. In other words, a person who lives in a residential area anywhere in the city may post a political sign on her property without a permit, but a person who owns an office building in the B-5 zoning district must obtain a permit before posting a political sign on that property.

The City asserts that there are two ways for a property owner or tenant to obtain a permit for a political sign in the B-5 zoning district. First, she may apply for a permit to substitute a political sign for her business sign pursuant to section 12.0, as long as the political sign conforms to "the size, height, area and other requirements of this [o]rdinance." See §§ 8.0(A)(3)(b), 12.0. Second, she may apply for a permit to substitute a political sign for a temporary real estate sign pursuant to sections 12.0 and 15.3(F)(3). See § 15.3 (F)(3). The City insists that it would issue a permit for a political sign without regard to the content of the message.

Although the City's construction of section 15.2(E)(1) appears to be at odds with the plain language of that section,

we will assume that it is a "permissible construction" for the purpose of analyzing the district court's holding with respect to Beaulieu's facial challenge. See Southlake Prop. Assocs., 112 F.3d at 1119. We proceed in this manner because even construing the ordinance exactly as the City wants, we still conclude that the provisions in question amount to a content-based regulation that cannot survive strict scrutiny.

We begin our evaluation of the constitutionality of the sign ordinance with the analytical framework set out in our prior decisions. See, e.g., Café Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274, 1286-87 (11th Cir. 2004). We first ask whether the ordinance is a content-neutral time, place, and manner regulation. Id. at 1286. "In order to be constitutional, a time, place, and manner regulation may not be based upon the content of the regulated speech, must be narrowly tailored to serve a significant government interest, and must leave open ample alternative channels for communication of the information." Id. If we determine that

the ordinance discriminates among political messages or discriminates in favor of commercial messages over political ones, it is content-based and we apply strict scrutiny. Id. at 1286-87.

In determining whether the sign ordinance is content-based, we are bound by our decisions in Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993), and Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005). In Dimmitt, we struck down an ordinance that required a property owner to obtain a permit before erecting or altering most signs but that exempted certain types of signs, including flags representing a governmental unit or body. 985 F.2d at 1568. We held that the ordinance was a content-based regulation because the flag exemption applied only to governmental flags. Id. at 1569. We concluded that the regulation did not survive strict scrutiny because the City's asserted interests in aesthetics and traffic were not compelling and did not justify content-based regulation of noncommercial

speech. Id. at 1569-70.

More recently in Solantic, we struck down a sign ordinance that exempted from its regulations several types of signs, including government and religious flags. 410 F.3d at 1255-57, 1274. We reasoned that the ordinance was content-based "because some types of signs are extensively regulated while others are exempt from regulation based on the nature of the messages they seek to convey." Id. at 1266. We concluded that the City's interests in aesthetics and traffic safety were not compelling and the ordinance's exemptions were not narrowly tailored to further those interests. Id. at 1267.

The City would have us believe that its sign ordinance is content-neutral because the substitution clause allows "any sign...[to] contain, in lieu of any other message or copy, any lawful noncommercial message." See Ordinance 03-010, § 12.0. It urges us to apply National Advertising Co. v. City of Miami, 402 F.3d 1329 (11th Cir. 2005) ("National I"), a

companion case to National I, in which we held that National's challenge to Miami's zoning ordinance was rendered moot by the subsequent amendment of the ordinance to include a substitution clause. National II, 402 F.3d at 1330. The clause provided that "[a]ny sign allowed herein may contain, in lieu of any other message or copy, any lawful, non-commercial message, so long as the sign complies with the size and height, area, and other requirements." Id. at 1335. We stated that the amendments "made clear that non-commercial messages would be permitted anywhere commercial messages were allowed" and remedied any constitutional problems with the ordinance. Id.

Although a substitution clause may turn an otherwise content-based regulation into a content-neutral, constitutional one, that is not the case here. Even if political signs can be submitted for real estate signs in the City of Alabaster, they are still not treated equally. Under the City's interpretation of its sign ordinance, a person who wants to post a real estate

sign can simply post the sign on her property. But a person who wants to substitute a campaign sign for a real estate sign under section 12.0 must visit Alabaster City Hall, complete an application for the substitution, pay the permit fee, and wait at least a week for a response. See Ordinance 03-010, §§ 2.0-2.5, 12.0.

In sum, under the sign ordinance it is easier, cheaper, and faster for Beaulieu to post a real estate sign than a campaign sign. Because political signs are subject to more regulatory burden than real estate signs, the sign ordinance discriminates against political speech in favor of commercial speech. See Solantic, 410 F.3d at 1266. It is a content-based regulation. See Café Erotica, 360 F.3d at 1286-87.

Like the ordinances in Dimmitt and Solantic, the present sign ordinance cannot survive strict scrutiny. The City's interests in aesthetics and traffic safety are substantial but they are not compelling for present purposes. See e.g., Members of the City Council of L.A. v. Taxpayers for

Vincent, 466 U.S. 789, 816-17, 104 S. Ct. 2118, 2135 (1984) (aesthetics was a substantial government interest); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08; 101 S. Ct. 2882, 2892 (1981) (plurality opinion) (aesthetics and traffic safety were substantial government interests); Solantic, 410 F.3d at 1267 ("[T]he sign code is not narrowly tailored to accomplish the City's asserted interests in aesthetics and traffic safety, nor has our case law recognized those interests as 'compelling.'"); Dimmitt, 985 F.2d at 1570 (aesthetics and traffic safety were not compelling state interests); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 (11th Cir. 1987) (aesthetics was a substantial government interest); Harnish v. Manatee County, Fla., 783 F.2d 1535, 1539 (11th Cir. 1986) (aesthetics was a substantial government interest); Supersign, 766 F.2d at 1530 (11th Cir. 1985) (aesthetics and traffic regulation were substantial government interests).

Even if the City's interests were compelling, the sign

ordinance is not narrowly tailored. The ordinance abstractly recites its interests in aesthetics and traffic safety without explaining how the regulations further those interests generally, or how it discrimination in favor of real estate signs promotes those interests specifically. See Solantic, 410 F.3d at 1267 ("The problem is that the ordinance recites those interests [in aesthetics and traffic safety] only at the highest order of abstraction, without ever explaining how they are served by the sign code's regulations generally, much less by its content-based exemptions from those regulations.").

The sign ordinance's exemption of real estate signs from the permit requirement may further the City's interest in nurturing the real estate market, but it will not make the City of Alabaster shine more brightly or make it a safer place to drive or stroll. See Solantic, 410 F.3d at 1268 ("Simply put, the sign code's exemptions are not narrowly tailored to accomplish either the City's traffic safety or aesthetic goals."); Dimmitt, 985 F.2d at 1570 ("Moreover, these asserted

interests [in aesthetics and traffic safety] clearly are not served by the distinction between government and other types of flags; therefore, the regulation is not narrowly drawn to achieve its asserted end.") (internal quotation marks omitted). Because we find that the City's sign ordinance is a content-based regulation that fails strict scrutiny, we need not consider whether the district court erred in holding that the ordinance impermissibly burdened core political speech.

VII.

The district court's decision is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

DONNA J. BEAULIEU, PLAINTIFF-APPELLEE,

V.

ALABASTER, CITY OF, a municipal corporation, DAVID FRINGS, Mayor of City of Alabaster, ALABASTER CITY COUNCIL, by and through its president, Rick Walters, CITY OF ALABASTER POLICE DEPARTMENT, BRIAN BRANDENBERG, DEFENDANTS-APPELLANTS.

DOCKET NO. 04-16230-BB.

DECIDED: SEPTEMBER 5, 2006

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: CARNES, HULL and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes

UNITED STATES CIRCUIT JUDGE ORD-42

APPENDIX C

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA

DONNA J. BEAULIEU, PLAINTIFF,

V.

ALABASTER, CITY OF, a municipal corporation, DAVID FRINGS, Mayor of City of Alabaster, ALABASTER CITY COUNCIL, by and through its president, Rick Walters, CITY OF ALABASTER POLICE DEPARTMENT, BRIAN BRANDENBERG, DEFENDANTS.

NO. CV-04-BE-2211-S

SEPTEMBER 24, 2004

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiff Donna J. Beaulieu filed this lawsuit for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 against defendants City of Alabaster; Mayor David Frings;

City Council President Rick Walters;[1] the City of Alabaster Police Department; and City of Alabaster police officer Brian Brandenburg alleging that Article X of the City's zoning ordinance, as amended, unduly burdens her First Amendment right of political expression.[2] For the reasons stated on the record, and elaborated upon below, the court finds that the City of Alabaster's zoning ordinance impermissibly burdens political speech in violation of the First Amendment.

Beaulieu questions the constitutionality of section 15.0 of the ordinance exempting political and other temporary signs from the general permitting requirements outlined in section 2.0 of the ordinance. Plaintiff specifically challenges section 15.2(E)(1) of the ordinance as relegating political signs to

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[1] Rick Walters and David Frings are signatories to the ordinance at issue in this case. *See* doc. # 20, *Ex.* 2.

[2] Plaintiff also argues that the City of Alabaster ordinance violates her Fourteenth Amendment due process and equal protection rights. The court pretermits discussion of these arguments because of its conclusion that section 15.2(E) of the ordinance violates the First Amendment.

residential districts that have been improved with a dwelling.[3] According to the plaintiff, the above-referenced sections are content-based restrictions on purely political speech.

The defendants present several procedural and substantive arguments supporting the ordinance's

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[3] Plaintiff initially challenged section 15.2(E)(5) of the ordinance limiting the posting of the political signs on public right-of-ways, utility poles, and trees, regardless of whether the posting occurs on private or public property. However, the court rules at the hearing on the motion for preliminary injunction that the City had the authority to impose such limitations on the posting of political signs pursuant to *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Plaintiff also challenged section 15.2(E)(6) requiring that political signs be removed within ten days after an election. The parties do not dispute that the election at issue in this case is currently scheduled for November 2, 2004. Consequently, section 15.2(E)(6) does not appear to be at issue in this case.

Lastly, when asked at the August 31, 2004 trial to delineate those sections of the ordinance at issue in this constitutional challenge, plaintiff did not mention section 15.2(E)(2) of the ordinance restricting political signs to ten feet in height and thirty-two square feet in sign face area. Consequently, the court construes Beaulieu's omission of this section as an abandonment of a challenge to the constitutionality of section 15.2(E)(2).

constitutionality. According to the defendants, the plaintiff's failure to exhaust her administrative remedies and her lack of standing are insurmountable procedural hurdles to her lawsuit challenging the constitutionality of the City's sign ordinance.

In a substantive attack on the merits of the plaintiff's First Amendment claim, the defendants argue that the City's ordinance does not preclude purely political speech in B-5 commercial districts. Relying on the declaration of building official Steven Sims, the City argues that the ordinance merely requires a person wishing to post a political sign on commercial property to comply with the permitting requirements outlined in section 2.0 of the ordinance.[4] Based on this construction of the ordinance, the City argues that "[t]he only time that political signs are specifically referenced, they are given preferential treatment by being exempted from

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[4] Section 2.0 of the ordinance reads "Permits, fees, and inspections" and generally applies to signs that must be permitted pursuant to the ordinance.

the general permit requirement of all signs."[5] Although not specifically addressing the validity of section 15.0 of the zoning ordinance and whether that portion of the ordinance is content-based, the defendants generally argue that the City's zoning ordinance is a valid, content-neutral time, place, and manner regulation on purely political speech. Consequently, the defendants argue that they have an important and substantial governmental interest in promoting traffic safety and promoting the City's aesthetic interest and that the City's ordinance is narrowly drawn to achieve these important and substantial government interests.[6]

After denying the plaintiff's motion for preliminary injunction (doc. # 16),[7] the court held a trial on the merits of

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[5] *See* Doc. # 20, pp. 9-10.

[6] *Id.*, at pp. 10-12.

[7] On July 19, 2004, the court denied the plaintiff's motion for expedited temporary restraining order (doc. # 4). The court likewise denied the preliminary injunction because the plaintiff failed to meet her procedural and substantive

the plaintiff's claims on August 18, 2004 and August 31, 2004. Currently pending before the court is the plaintiff's petition for permanent injunction and complaint for injunctive and declaratory relief. Both parties submitted evidentiary materials and briefs in support of their respective positions. At trial the defendants elicited testimony from expert witness Dr. Eric Kelly, who drafted the amendments to the ordinance at issue in this case. The court has jurisdiction on this lawsuit under 28 U.S.C. § 1331 pursuant to its federal question jurisdiction.

II. FINDINGS OF FACT[8]

Beaulieu is a licensed attorney engaged in the active practice of law at 122 Main Street in the City of Alabaster, Alabama. Section 2.1 of the City's zoning ordinance provides

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burdens. The plaintiff did a better job at the hearing on the merits of articulating more precisely the constitutional basis of the challenge to the ordinance.

[8] The material facts of this case are undisputed.

that "[i]t shall be unlawful for any person to erect...any sign in the City or cause the same to be done, without first obtaining a building permit for each sign from the Building Official as required by the Ordinance."[9] In compliance with this portion of the ordinance, Beaulieu obtained a sign permit on September 26, 2003 for an on-premise, building-front sign that reads "Donna J. Beaulieu, Attorney at Law."

Beaulieu's office is located in a B-5 commercial district. Section 8.0 of the ordinance outlines the type of signs permitted in the B-5 commercial district and limits businesses like the plaintiff's law office to one canopy or projecting sign not to exceed thirty-two (32) square feet or to one building wall sign not to exceed "ten (10) percent of the front building wall area... ."[10] Although section 12.0 of the ordinance permits the substitution of a lawful noncommercial message,

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[9] *See* 20, Ex. 2.

[10] *Id.*, section 8.0.

it only permits the substitution "so long as said sign [substituted sign] complies with the size, height, area and *other requirements of this ordinance*." (emphasis added).

Plaintiff is also a candidate for Circuit Judge in Shelby County and is on the ballot for the November 2, 2004 general election. In an attempt to generate interest in her campaign, Beaulieu began displaying political signs in support of her candidacy. In April 2004, plaintiff displayed a political campaign sign on the sidewalk in front of her office in the B-5 commercial district. This sign was a stand-along, upside down "V"-shaped sign about 6 feet high and 3 feet wide with two smaller "Donna J. Beaulieu for Circuit Judge" signs on both sides. Beaulieu's supporters also placed campaign signs in other locations within the Alabaster City limits, including on trees and on utility poles.

On June 18, 2004, Officer Brandenburg hand-delivered a notice to Beaulieu's office advising her that the

violated Section 15.2(E)(1) of the City's sign ordinance. The citation stated:

> political signs may only be displayed in a residential zoning district on property which is improved with a dwelling. This letter serves as a ten (10) calendar day notice to correct these things to *avoid any further legal action.* Your cooperation in this matter is greatly appreciated.[11]

(emphasis added). Plaintiff removed the sign from her commercial property on June 28, 2004.

On July 15, 2004, Brandenburg again cited plaintiff for a violation of section 15.2(E)(5) of the ordinance.[12] After receiving the July 15, 2004 citation, plaintiff removed her signs from trees and utility poles based on the location information provided by City enforcement officials. Both citations warned Beaulieu that she had ten (10) calendar days to correct the ordinance violations to avoid further legal

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[11] *See* doc. # 17, *Ex.* 2.

[12] *See* doc. # 17, *Ex.* 5.

action.[13]

Section 15.2 is the only portion of the sign ordinance that specifically references political speech and provides:

> (1) Political signs *shall only be located in a residential zoning district on property which is improved with a dwelling...*
> (5) Political signs shall not be placed in a public right-of-way or on any utility pole or tree, whether on public or private property.

(emphasis added). However, section 15.0 of the ordinance also provides for the display of other types of temporary signs without a permit. For example, section 15.3 (F)(3) of the ordinance permits business owners in the B-5 commercial district to display temporary real estate signs on the premises without a permit provided that the sign does not exceed thirty-two (32) square feet. The temporary real estate sign may be displayed in addition to the sign for which a business obtained a permit. The ordinance makes no similar provision for the display of political signs by business owners in the B-5

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[13] *Id.*, at *Ex.* 4 & 5.

commercial district.[14]

III. DISCUSSION

A. Legal Framework for Assessing Claims under 42. U.S.C. § 1983.

The court rejects the defendants' procedural arguments related to standing and the exhaustion of administrative remedies. As a general rule, a plaintiff has standing to assert only a violation of his or her own rights. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). Exceptions to this rule in the First Amendment context allow a plaintiff to challenge a law on its face on the ground that it is content-based, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992), or that it might chill the First Amendment rights not only of the plaintiff, but of others not before the court, *see Am. Booksellers*, 484 U.S. at 392-93.

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[14] *See* Transcript, August 31, 2004 trial on the merits. At the trial on the merits, defense counsel for the City argues that the plaintiff could display a political sign in front of her business is she substituted it for the commercial sign for which she already had on the premises.

Beaulieu has standing to bring this action based on her contention that the June 18, 2004 and July 15, 2004 ordinance citations injure her First Amendment rights, that the City's ordinance has a chilling effect on purely political speech, and the ordinance is a content-based restriction on political speech.

The court also rejects the defendants' second procedural argument because the exhaustion of state administrative remedies is not a prerequisite to filing suit under 42 U.S.C. § 1983. *See Granite State Outdoor Adver. Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1118, n. 5 (11th Cir. 2003).

Having rejected the defendants' procedural arguments, the court next examines the general framework for analyzing an alleged deprivation of constitutional rights pursuant to 42 U.S.C. § 1983. To successfully assert a claim pursuant to section 1983, a plaintiff must establish that she suffered a deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States and that the act or

omission causing the deprivation was committed by a person acting under color of state law. *Nail v. Cmty. Action Agency of Calhoun County*, 805 F.2d 1500, 1501 (11th Cir. 1986). "[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution of laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

The City ordinance at issue in this case was enacted pursuant to the City of Alabaster's municipal authority. Furthermore, Officer Brandenburg acted under color of state law when he cited the plaintiff for the ordinance violations on June 18, 2004 and July 15, 2004. The plaintiff thus has established the "under the color of state law requirement." Therefore, to prevail, Beaulieu must demonstrate that she was "deprived...of a right secured under the Constitution or federal

law." *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993).

B. The First Amendment and Political Speech

The plaintiff asserts that section 15.2(E)(1) of the ordinance violates her First Amendment right to conduct political speech in the B-5 commercial district. The First Amendment provides, in pertinent part, that "Congress shall make not law...abridging First Amendment's prohibition to the states. *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n. 1 (1994). The Supreme Court has long held that regulations designed to restrain speech on the basis of its content are subject to strict scrutiny and are presumptively invalid under the First Amendment. *See R.A.V.*, 505 U.S. at 382. Content-based regulations "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). An ordinance is content-based when the content of the speech determines whether the ordinance

applies. *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

Beaulieu argues that the City's ordinance prohibiting political campaign signs in the B-5 commercial district is content-based because a person must read the sign to determine whether the sign is allowed within the business district and because the City's ordinance favors commercial speech over political speech.[15] Not surprisingly, the defendants disagree. They argue that the ordinance is content-neutral because it does not attempt to regulate or restrict the content of any sign allowed under the ordinance, but merely regulates the location, timing, and manner in which the sign is displayed.[16] The court acknowledges that the cases cited by the parties support both arguments. However, the cases cited by each side primarily involve constraints on commercial

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[15] *See* doc. # 17, p. 6.

[16] *See* doc. # 20, p. 10-13.

speech, not political speech and not directly applicable to this case. *Compare Lamar Adver. Co. v. City of Douglasville*, 254 F. Supp.2d 1321, 1331-32 (N.D. Ga. 2003) (cited by the plaintiff in support of her argument that the ordinance at issue in this case is content-based) *with Messer v. City of Douglasville*, 975 F.2d 1505, 1510 (11th Cir. 1992) (cited by the defendants in support of their argument that the ordinance at issue in this case is content-neutral).

In interpreting the First Amendment within the context of political speech, the Supreme Court holds that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). When a law burdens core political speech, courts apply "exacting scrutiny" and uphold the restriction *only* if it is narrowly tailored to serve an overriding state interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) (citing *First Nat. Bank of Boston v. Bellotti*,

435 U.S. 765, 786 (1978)).

In *McIntyre*, the plaintiff was fined for passing out pamphlets opposing a school tax levy in violation of an Ohio statute prohibiting the distribution of anonymous campaign literature. *McIntyre*, 514 U.S. at 337. The statute at issue in *McIntyre* regulated purely political speech and according to the Supreme Court, applied evenhandedly to advocates of differing viewpoints. *McIntyre*, 514 U.S. at 345. Despite this recognition of the seemingly content neutrality of the challenged statutory provision, the Court nevertheless reasoned that the Ohio ordinance prohibiting the distribution of anonymous campaign literature "'involves a limitation on political expression subject to exacting scrutiny.'" *McIntyre*, 514 at 345-46 (citing *Meyer v. Grant*, 486 U.S. 414, 420 (1988)). The Court further explained that the category of speech regulated by the Ohio statute occupies the core protection afforded by the First Amendment. *McIntyre*, 514 U.S. at 346. According to the *McIntyre* Court, "[t]he First

Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the brining about of political and social changes desired by the people.'" *McIntyre*, 514 U.S. at 346 (internal quotations and citations omitted).

Based on the above-referenced jurisprudential principles, the Court concluded that Ms. McIntyre's speech was entitled to the greatest constitutional protection and held that "[w]hen a law burdens core political speech, [the court] appl[ies] exacting scrutiny and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 346. *See also Fed. Elec. Comm'n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (reiterating *McIntyre's* holding that "exacting scrutiny" is applied to determine whether the law is narrowly tailored to serve an "overriding" state interest and applying strict scrutiny

to a federal campaign statute).[17] Against the backdrop of the above-referenced legal authority, the court considers the constitutionality of the sign ordinance at issue in this case.

As a preliminary matter, the court rejects the defendants' substantive arguments regarding the construction of the sign ordinance.[18] With the successful completion of the permitting requirement outlined in section 2.0 of the ordinance, the defendants argue that individuals like Ms.

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[17] Although political speech is generally entitled to greater constitutional protection, the Supreme Court has, in some instances, limited purely political speech. *See Burson v. Freeman*, 504 U.S. 191, 199-201 (1992) (upholding a ban on temporary political signs within 100 feet of polling places); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804-5 (1984) (upholding the constitutionality of a Los Angeles ordinance prohibiting the posting of handbills and signs on utility poles and public property).

[18] The court does not address the defendants' argument that it must construe any ambiguity in such a manner to preserve the ordinance's unconstitutionality because, as explained in the body of this opinion, the court concludes that the section 15.2(E)(1) of the ordinance as written and applied unambiguously provides that political signs are limited to residential areas that have been improved with a dwelling.

Beaulieu are allowed to post political signs in the B-5 commercial district. By affidavit of Steven Sims, City of Alabaster Building Official, the defendants asserted that political signs are not prohibited in the business district if the business owner obtains a permit for the sign and the sign meets the other requirements of the ordinance, including the limitations of one sign per business. However, defendant Brandenburg, the City's enforcement officer, relied on the plain language of the ordinance when he cited plaintiff. Brandenburg's citation explains that "political signs may only be displayed in a residential zoning district on property which is improved with a dwelling." [19] The inconsistent interpretations and application of the ordinance undermines the defendants' legal position. Therefore, the court rejects the defendants' interpretation of the ordinance because it does not comport with the clear language of section 15.2(E)(1) that

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[19] *See* doc. # 17, *Ex.* 2.

political signs "shall only be located in a residential zoning district on property which is improved with a dwelling," nor with the manner in which the City enforced the ordinance.

Having resolved the dispute about the appropriate interpretation of the ordinance, the court turns to the issue of whether section 15.2(E)(1) violates the plaintiff's First Amendment right to political expression because it restricts political speech to residential areas of the City to properties that have been improved with a dwelling. In their submissions to the court, the defendants argue that section 15.2(E)(1) does not thwart Beaulieu's First Amendment right to political expression. Section 8.0 of the ordinance limits business owners in the B-5 commercial district to one canopy or projecting sign. Furthermore, section 12.0 of the ordinance permits the substitution of a lawful commercial message "so long as said sign complies with the size, height, area, and other requirements of this ordinance." According to the defendants, section 8.0, when read in conjunction with section

12.0, permits a business owner like Beaulieu to substitute her on-premise, building-front sign that reads "Donna J. Beaulieu, Attorney at Law" for a temporary political sign endorsing her candidacy.

In the alternative, the defendants argue that "it would be absolutely permissible for the Plaintiff to replace the confirming sign that currently advertises her law practice with a sign that says 'Law Offices of Donna J. Beaulieu' on one half of the sign and 'Vote Donna J. Beaulieu for Circuit Judge' on the other half of the sign."[20] Therefore, the defendants argue that Ms. Beaulieu is not precluded from erecting a political campaign sign in the B-5 commercial district, and thus, is not divested of any First Amendment rights.

The court finds the defendants' arguments unpersuasive for two primary reasons. First, as outlined in an

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[20] *See* doc. # 29, p. 11.

earlier portion of this opinion, the defendants' arguments that political signage permitted in the B-5 commercial district via the substitution of messages language contained in section 12.0 contradicts the clear language of section 15.2(E)(1) that political signs "shall only be located in a residential zoning district on property which is improved with a dwelling" and with the manner in which the City enforced the ordinance.

Second, and perhaps more importantly, a municipal regulation requiring proponents of political speech, like Ms. Beaulieu, to choose between displaying the *one* commercial sign permitted in B-5 commercial district to announce the location of her business or substituting the commercial sign with a temporary political sign impermissibly burdens core political speech. *See McIntyre*, 514 U.S. at 346-47. In the scenario advanced by the defendants, candidates like Ms. Beaulieu, who are also business proprietors, face a proverbial "Hobson's choice" between advertising a business that is integral to their economic livelihood or generating public

awareness through the relatively inexpensive vehicle of political campaign signs. *See e.g., Baldwin v. Redwood City*, 540 F.2d 1360, 1368 (9th Cir. 1976) (reasoning that "political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With the exception of handbills, they are the least expensive means by which a candidate may achieve recognition among voters in a local election.").

Furthermore, the burden to core political speech is not ameliorated by Ms. Beaulieu's ability to advertise her law practice with a sign that reads "Law Offices of Donna J. Beaulieu" on one half of the sign and "Vote Donna J. Beaulieu for Circuit Judge" on the other half of the sign. Ms. Beaulieu's free speech rights would still be burdened in the above-referenced "mixed-message" scenario because the plaintiff would be required to dilute core political speech to advertise the location of her law practice.

The court envisions that business owners in the City of

Alabaster have views concerning the political activities of that City. Under the ordinance at issue in this case, unless business owners also had property in the residential section that was improved by a dwelling or unless business owners were willing to sacrifice a commercial message advertising their business or were willing to permit the co-existence of commercial and non-commercial messages, business owners would have no place in which to exercise their constitutional right of political expression. The above-referenced dilemma faced by Ms. Beaulieu and similarly-situated political candidates in attempting to erect campaign signs in the B-5 commercial district is precisely the type of burden on pure political speech that the *McIntyre* Court held triggered the strict scrutiny standard for analyzing the ordinance's constitutionality. Simply put, even with the benefit of the substitution of messages language contained in section 12.0 of the ordinance, the ability of the plaintiff to communicate with potential voters and engage in pure political speech is

impermissibly burdened. Consequently, the court concludes that section 15.2(E)(1) of the ordinance – on its face and as applied – burdens core political speech.

Thus, under the "exacting scrutiny" applied by the Supreme Court in *McIntyre*, the City's prohibition of political speech in the B-5 commercial district must fail unless it is narrowly tailored to meet an overriding governmental interest. *See McIntyre*, 514 U.S. at 346-47. The defendants' arguments, all of which assume a significantly more lenient standard of review[21] and which focus on the City's interest in promoting aesthetics and traffic safety, do not survive the exacting scrutiny that this court must apply when a law burdens core political speech. Even where the government has declared a policy of promoting aesthetics and traffic safety, restrictions intended to accomplish those interests have traditionally failed to pass strict scrutiny when they burden

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[21] *See* doc. # 29, p. 12-16.

political speech. *See City of Ladue*, 512 U.S. at 52-53; *Arlington County Republican Comm. v. Arlington County, Virginia*, 983 F.2d 594, 587 (4th Cir. 1993). Likewise, in this case, the court concludes that the City's interests in aesthetics and traffic safety, although substantial, are no sufficiently overriding to satisfy the exacting, strict scrutiny standard of review applied by the *McIntyre* Court.

In addition to impermissibly burdening core political speech, the court alternatively finds that section 15.2(E)(1) is a content-based restriction on purely political speech. In *Sugarman v. Village of Chester*, 192 F. Supp. 2d 282, 300 (S.D.N.Y. 2002), a former political candidate filed a lawsuit under 42 U.S.C. § 1983 alleging that various municipal sign ordinances regulating the posting of political signs violated her First Amendment right of free speech. While affirming the constitutionality of some of the municipal ordinances at issue in the case, the *Sugarman* court invalidated as content-based a sign ordinances enacted by the Villages of

Hamptonburgh and Warwick. *Sugarman*, 192 F. Supp.2d at 297-98; 300. The court invalidated the ordinance enacted by the Village of Hamptonburgh because the ordinance enacted durational limitations on the posting of some temporary signs, but not others. *Sugarman*, 192 F. Supp. 2d at 297. The court rules that this type of differential treatment between differing categories of temporary signs rendered the ordinance content-based. *Id.*

Similarly, the court invalidated the ordinance enacted by the Village of Warwick because it exempted political signs from permit requirements provided that they met durational and size limitations, but exempted real estate and other classes of noncommercial signs from permit requirements without imposing such limitations. *Sugarman*, 192 F. Supp. 2d at 300. The *Sugarman* court reasoned that the differential treatment between political signs and commercial signs made the ordinance a content-based restriction triggering the strict scrutiny standard. 192 F. Supp. 2d at 300-301. *See also, Boos*

v. Barry, 485 U.S. 312, 321 (1988) (holding that when a court determines that a municipal ordinance is content-based, the strict scrutiny standard of review applies and the municipality must show that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve a compelling state interest); *Matthews v. Town of Needham*, 764 F.2d 58, 60-61 (1st Cir. 1985) (holding that municipal ordinance prohibiting the posting of political signs but permitting the posting of specific types of commercial signs was a content-based restriction on pure political speech).

As recognized by the City's own expert witness, Dr. Eric Kelly, the City's ordinance actually favors commercial temporary signs over political temporary signs. For example, pursuant to section 15.3(F)(3) of the ordinance, temporary real estate signs may be displayed in the B-5 commercial district without a permit provided that the sign does not exceed thirty-two square feet of sign face area. Consequently, a business owner may display the one commercial sign for which he

received a permit and one temporary "for sale" sign. However, if a business owner, like Ms. Beaulieu, wanted to exercise her constitutional right of political speech, she would have to substitute the political sign for the business sign. Allowing large temporary real estate signs in the business district while not allowing a temporary political sign of any dimension unless it is substituted for a permitted commercial sign favors commercial speech over political speech, and therefore, is content-based restriction triggering the strict scrutiny standard of review. Furthermore, to determine whether the temporary sign is a prohibited political sign or an allowed real estate sign requires that the enforcer of the ordinance read the sign. Therefore, the ordinance is not content-neutral. *See Nationalist Movement*, 505 U.S. at 131.

The City has not provided the court with any overriding or compelling state interest that is served by allowing one temporary real estate sign and only allowing a political sign if it is a substitution for a commercial sign for

which a permit has already been issued, or requiring a permit for a temporary political sign if no other sign exists at the location. Based on the above-referenced differential treatment between temporary political signs and temporary commercial real estate signs, the court concludes that section 15.2(E)(1) of the ordinance is a content-based regulation of political speech that does not survive the strict scrutiny standard of review.

IV. CONCLUSION

Based on the reasons outlined in this Memorandum Opinion, the court concludes that section 15.2(E)(1) of the City of Alabaster sign ordinance impermissibly burdens core political speech in violation of the First Amendment, is a content-based restriction that treats core political speech less favorably than commercial speech, and is not narrowly tailored to promote the City's stated governmental interests in aesthetics and traffic safety. Pursuant to its prior rulings in this case, the court concludes that section 15.2(E)(5) of the City of Alabaster sign ordinance limiting the posting of

political signs on public right-of-ways, utility poles, and trees is not an abridgment of the plaintiff's First Amendment right of political speech. A separate order delineating the court's specific findings will be entered contemporaneously with this Memorandum Opinion.

DONE and ORDERED this 24th day of September, 2004.

/s/ Karen O. Bowdre
KAREN O. BOWDRE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA

DONNA J. BEAULIEU, PLAINTIFF,

V.

ALABASTER, CITY OF, a municipal corporation, DAVID FRINGS, Mayor of City of Alabaster, ALABASTER CITY COUNCIL, by and through its president, Rick Walters, CITY OF ALABASTER POLICE DEPARTMENT, BRIAN BRANDENBERG, DEFENDANTS.

NO. CV-04-BE-2211-S

SEPTEMBER 24, 2004

ORDER OF FINAL JUDGMENT

In accordance with the Memorandum Opinion entered contemporaneously with this Order of Final Judgment, it is ORDERED, ADJUDGED, and DECREED as follows:

(1) The speech at issue in this case is the essence of First Amendment expression. That this lawsuit occurred in the proverbial "heat" of a candidacy for political office only strengthens the protection afforded Beaulieu's expression. No

form of speech is entitled to greater constitutional protection than that asserted by the plaintiff in this case.

(2) Section 15.2 (E)(1) of the City ordinance limiting political signs to residential districts that have been improved with a dwelling is unconstitutional – as written and as applied – because it burdens core political speech and is a content-based restriction on purely political speech that treats core political speech less favorably than commercial speech. Specifically, proponents of political speech in the B-5 commercial district must comply with the permitting requirements of section 2.0 or substitute a political sign for a business sign, while commercial temporary real estate signs are allowed in the B-5 commercial district without a permit.

(3) Section 15.2(E)(1) is not narrowly tailored to promote the City's stated interest in aesthetics and traffic safety and does not survive the exacting scrutiny that this court must apply when a law burdens core political speech and is a content-based restriction on purely political speech.

(4) The defendants are permanently enjoined from implementing, facilitating, or otherwise enforcing the limitation of political signs to residential property that has been improved with a dwelling contained in section 15.2(E)(1) of the City ordinance. Political signs in the B-5 commercial district shall be treated the same as temporary real estate signs that are allowed without a permit in the B-5 commercial district. Businesses in the B-5 commercial district shall be allowed to have one additional real estate sign on a temporary basis without a permit.

(5) Pursuant to the severance clause contained in section 5(E) of the City's ordinance,[1] the court's ruling that section 15.2(E)(1) of the ordinance is unconstitutional does not affect the validity of any other portion of the ordinance. The court does not consider the validity of particular aspects of the ordinance not at issue in this lawsuit.

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[1] *See* doc. # 20, *Ex. 2.*

(6) Section 15.2(E)(5) of the City's ordinance prohibiting the posting of political signs on public right-of-ways, utility poles, and trees docs not violate the First Amendment and is a valid, content-neutral, time, place, and manner restriction.

(7) All pending motions, with the exception of the plaintiff's motion for attorney's fees (doc. # 28), are DENIED as moot. The court will enter a separate order addressing the plaintiff's request for attorney's fees.

Costs are taxed to the parties as paid.

DONE and ORDERED this 24th day of September, 2004.

/s/ Karen O. Bowdre
KAREN O. BOWDRE
UNITED STATES DISTRICT JUDGE

APPENDIX E
DECLARATION OF STEVEN SIMS

AUGUST 11, 2004

Comes now the undersigned and subscribes under penalty of perjury the following declaration in accordance with 28 U.S.C. § 1746:

My name is Steven Sims. I am over the age of 19 years and I make this declaration based upon my own personal knowledge, information and belief.

I am the Building Official for the City of Alabaster, Alabama ("the City"). I was employed by the City in that position at all times relevant to the subject matter of the present lawsuit. It is my duty to review and, in turn, to grant or deny sign permit applications in the City of Alabaster. I am the only official with the City of Alabaster charged with that duty. Specifically, Officer Brian Brandenberg, the City's code enforcement official, cannot approve or deny sign permit applications. My decisions as the Building Official

are, however, subject to review as set forth more fully below.

Alabaster is governed by a comprehensive Zoning Ordinance, ALABASTER, ALA., ZONING ORDINANCE No. 99-010 ("the Zoning Ordinance"). The Zoning Ordinance consists of twelve articles addressing various topics, including among other things the Zoning Ordinance's stated purposes, review and appeal procedures, signs, and severability. Article X of the Zoning Ordinance deals specifically with signs in the City of Alabaster. On November 3, 2003, the Zoning Ordinance was amended by ALABASTER, ALA., ORDINANCE No. 03-010. ALABASTER, ALA., ORDINANCE No. 03-010 made amendments to both Article III and Article X of the Zoning Ordinance. All cites to ordinance sections referenced herein are to Article X of the Zoning Ordinance, as amended by ALABASTER, ALA., ORDINANCE No. 03-010, unless otherwise specified.

As the Building Official, when I am presented with an

application for a sign permit, my review of the application is governed by Article X, Section 2. This directive was specifically included in ALABASTER, ALA., ORDINANCE No. 03-010 as Section 1.B., Amendments to Article III, Administrative Provisions. I am not given any discretion in whether I can grant or deny a permit application. I am required to follow the provisions of Article X, Sections 2.2. and 2.3.

The only sign permit application that the City ever received from Donna J. Beaulieu, attorney at law, was for a sign on the front of her law office, which is located on Highway 31 South in the City of Alabaster. Ms. Beaulieu did not make application for the sign on the front of her office prior to posting it on the front of her building. I discovered that she had posted the sign without applying for a permit; neither she nor anyone on her behalf initially brought this to the City's attention. She had recently moved her law office

to its present location when I discovered that her sign had been posted without a permit. Although Ms. Beaulieu was in violation of the City's sign regulations because she erected her sign before applying for a permit, see Article X, Section 2.1., I worked with Ms. Beaulieu to see that her sign became properly permitted. Because she was willing to correct the violation, the City did not attempt to punish her in any way. It is the City's standing policy to work with individuals and/or businesses to bring any violations of the City's Zoning Ordinance, including its sign regulations, into compliance. This policy is extended and applied equally and uniformly to all citizens and businesses within the City. Ms. Beaulieu applied for the permit to post the sign on the front of her building on September 25, 2003, and the permit was subsequently issued the next day.

Ms. Beaulieu was not required to provide the content of her sign as a part of the permitting process. The only

permitting requirements were limited to size, height, and location specifications. The provisions for a sign permit application are provided by Article X, Section 2.2., and those provisions in no way require the applicant to specify the content of the sign. Ms. Beaulieu's law office is located in a B-5 zoning district, and as long as her sign met the size, height, and location requirements for a B-5 zoning district, which are set forth in Article X, Section 8, it would have been approved as it was. This is true whether the sign advertised her law practice, as it did and does, or whether it had contained a political message.

Political signs are not banned from the B-5 zoning district. However, within a B-5 zoning district any sign posted must be permitted, as provided by Article X, Sections 2.1. and 8, regardless of the content of the sign. Therefore, the permitting requirement would apply equally to political signs as it does to other types of signs. The City does not

distinguish signs which are subject to a permit on the basis of their content.

As a general rule of thumb, under Article X, Section 2.1., all signs within the City of Alabaster must be permitted prior to posting. There are, however, certain exceptions to the general permit requirement. For example, Article X, Section 15.2., allows certain signs to be erected without a permit. One type of sign allowed without a permit are political signs in a residential zoning district that have been improved with a dwelling. This exception to the general permitting requirement is set forth in Article X, Section 15.2.E. It is my understanding that Ms. Beaulieu contends that Section 15.2.E.1. limits the location of political signs in the City of Alabaster strictly to residential zones. This is simply untrue. The sole purpose of the provisions of Section 15 are to allow for certain signs without requiring a permit. In other words, it gives them preferred status. Among the

signs given this preferred status are political signs in a residential zoning district on property which is improved with a dwelling. In the complete context of Section 15, Section 15.2.E.1. should be read as "Political signs shall only be located in a residential zoning district on property which is improved with a dwelling" to be exempted from the permitting requirements set forth in Article X.

Under Article X, Section 2.4., an applicant is specifically allowed to take an appeal to the Board of Adjustment for the denial of a permit by the Building Official. In the case at hand, Ms. Beaulieu was not denied a permit to erect any sign whatsoever, including a political sign, at her law office. As the Building Official, it is my duty to attend all meetings of the Board of Adjustment. During my tenure as the Building Official, Ms. Beaulieu has never taken an appeal to the Board of Adjustment. Even more specifically, she has never appealed any decision to the Board

of Adjustment that I have made or any decision that Officer Brandenberg has made.

Under Article X, Section 2.7., whenever a sign owner is ordered to remove a sign within the City because it is believed to be in violation, the sign owner has the right to appeal the order of removal to the Board of Adjustment. When such an appeal is made, the enforcement of the order for removal shall be suspended pending a ruling from the Board of Adjustment. Again, after Ms. Beaulieu was given notice that she was in violation, Ms. Beaulieu never took advantage of Section 2.7. to take an appeal to the Board of Adjustment. If she had taken such an appeal, any action by the City's officials would have been held in abeyance until the Board of Adjustment had rendered its decision on the appeal.

Under Article III, Section 2.0., Ms. Beaulieu could have initiated a proposed change of the zoning regulations as

they pertain to her piece of property. The procedures for making such a change are set forth in Article III, Section 2.1. To utilize this remedy, Under Article III, Section 2.1.A., Ms. Beaulieu would have to submit her application to me, the Building Official. To date, Ms. Beaulieu has made no such application.

Article III, Section 3.1., allows anyone aggrieved with a decision concerning any interpretation or administration of the Zoning Ordinance to take an appeal to the Board of Adjustment. To utilize this remedy, under Article III, Section 3.1.A., Ms. Beaulieu would have to submit her appeal application to me, the Building Official. To date, Ms. Beaulieu has made no such application.

If Ms. Beaulieu believed that she needed a special exception from the uses stipulated for a particular zoning district, under Article III, Section 3.2., she could have made such a request to the Board of Zoning Adjustment. To utilize

this remedy, under Article III, Section 3.2.A., Ms. Beaulieu would have to submit her special exception application to me, the Building Official. To date, Ms. Beaulieu has made no such application.

If Ms. Beaulieu believed that she needed a variance from the requirements of the Zoning Ordinance, under Article III, Section 3.3., she could have made such a request for the consideration of the Board of Zoning Adjustment. To utilize this remedy, under Article III, Section 3.3.A., Ms. Beaulieu would have to submit her variance application to me, the Building Official. To date, Ms. Beaulieu has made no such application.

As stated herein, Ms. Beaulieu has not petitioned the Board of Adjustment for any relief or review whatsoever. However, if she had and had been aggrieved of any decision rendered by the Board, Ms. Beaulieu could have taken an appeal to the Circuit Court according to the provisions of

Article III, Section 3.5.

If Ms. Beaulieu now wants to change the existing sign on the front of her law office, she must submit a new permit application, regardless of what the content may be. Under Article X, Section 2.1., a permit is required "to erect, construct, enlarge, move, alter or convert any sign in the City or cause the same to be done." As explained above there is no ban on political signs in a B-5 zoning district, as long as such signs meet the size, height, and location requirements. However, as further proof that this is true, the City included a substitution provision in Article X, Section 12.0. Under Section 12.0., if Ms. Beaulieu were to apply for a permit to replace the existing, lawful sign on the front of her law office, which advertises her law practice, with an identical sign in size, height, and location but bearing a noncommercial message–a political message included–she would certainly be allowed to do so.

Under Section 15.1.A., a permit is not required for "[c]hanging of the advertising copy of message on an existing approved sign or marquee which is specifically designed for the use of replaceable copy." However, the sign currently existing on the front of Ms. Beaulieu's law office is not designed for the use of replaceable copy, as a billboard would be, for example.

Signs allowed in a B-5 zoning district are subject to the same restrictions as political signs allowed without a permit by Section 15.2.E. In a B-5 zoning district, canopy signs or projecting signs cannot be larger than thirty-two (32) square feet, and under Section 15.2.E.2., political signs meeting the location requirements of Section 15.2.E.1. are also subject to the size restriction of thirty-two (32) square feet. While Section 15.2.E.5. provides that political signs meeting the location requirements of Section 15.2.E.1. "not be placed in a public right-of-way or on any utility pole or

tree, whether on public or private property," according to Article X, Sections 13, 14.0.D. and 14.0.E., no such sign of any nature, whether permitted or not, whether political or otherwise, is allowed within the City of Alabaster.

As the Building Official for the City of Alabaster, it is an essential part of my duties to be familiar with the zoning classifications for land located in the City of Alabaster. The land use designation in the City is overwhelming residential as opposed to commercial. In my opinion, a very safe estimate would be that over eighty percent of the land in Alabaster is zoned for residential purposes. There are far more roads and access ways located within the residential zoning districts than in all of the City's other zoning districts combined. Therefore, there are far more opportunities for people to see signs posted in residential zoning districts within the City than in commercial or other zoning districts.

I declare under penalty of perjury that the foregoing is

true and correct.

Executed on this the 11 day of August, 2004.

Further Declarant saith not.

/s/ Steven Sims
Steven Sims, Building Official
City of Alabaster, Alabama

APPENDIX F

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ALABAMA

DONNA J. BEAULIEU, Plaintiff,

V.

ALABASTER, CITY OF; a municipal corporation; DAVID FRINGS, in his official capacity as Mayor of City of Alabaster; ALABASTER CITY COUNCIL, by and through its PRESIDENT, RICK WALTERS; CITY OF ALABASTER POLICE DEPARTMENT, specifically BRIAN BRANDENBURG, in his capacity as officer and employee of the Alabaster Police Department; and A, B, C, D and E, being that individual, firm or other legal entity who or which in any way committed any acts, and/or contributed in any way to the acts or omissions alleged in Plaintiff=s complaint, the true name(s) of which will be added by Amendment when ascertained, Defendants.

COMPLAINT FOR DECLARATORY JUDGEMENT AND INJUNCTIVE RELIEF

(JURISDICTION AND VENUE)

1. This action arises under the constitution of the United States and its laws, including under provisions of 42 U.S.C. Sec. 1983, and under the general federal question

jurisdiction provisions of 28 U.S.C. Sections 1331 and 1343. Declaratory and injunctive relief is also sought pursuant to the provisions under 28 U.S.C. Sec 2201 and 2202, as each has been amended from time to time to redress and enjoin unconstitutional acts on the part of governing bodies.

2. At all times mentioned in this Complaint, Plaintiff, Donna J. Beaulieu, is over the age of nineteen (19) years, a resident citizen of the United State of Alabama, and an attorney, licensed and practicing in the State of Alabama, and, more specifically, has a law practice located in the City of Alabaster, Alabama.

3. At all times mentioned in this Complaint, Plaintiff is a candidate qualified under the laws of the State of

Alabama to run for Circuit Judge, Place 4, in Shelby County, Alabama. Plaintiff is on the ballot for the November 2nd, 2004, general election and has been on no prior ballots as she was unopposed in the primaries. Plaintiff has not previously held or run for any elective office and is not considered a public figure or well known in political circles.

4. At all times mentioned in this Complaint, Defendant, City of Alabaster, was and is a municipal corporation organized under the laws of the State of Alabama, with its principal place of business located in Shelby County, Alabama.

5. At all times mentioned in this Complaint, Defendant, Mayor David Frings, is over the age of nineteen

(19) years, is a resident citizen of Shelby County, Alabama, and, at all times material to this action, is acting in his capacity as Mayor of the City of alabaster, Alabama.

6. Defendant, Alabaster City Council, is an organization within and established and governed by the City of Alabaster, Alabama, and is named in this Complaint by and through its President, Rick Walters, acting in his capacity as President of the Alabaster City Council.

7. Defendant, City of Alabaster Police Department, is an organization within and established and governed by the City of Alabaster, Alabama, and is named in this Complaint by and through Defendant, Officer b. Brandenburg, who is over the age of nineteen (19) years and is a resident and

citizen of Shelby County, Alabama, and, at all times material to this action, was acting in his capacity as an agent and law enforcement employee of the City of Alabaster.

8. All individual Defendants may be hereinafter referred to collectively as the City of Alabaster for purposes of this Complaint.

9. At all times mentioned in this Complaint, as of November 3, 2003, Defendant City has in effect Ordinance No. 03-010 which is deemed an amendment to the City=s zoning ordinance relating to advertising signs. The ordinance contains a section 15.0, part E which governs political campaign signs.

(COMPLAINT FOR DECLARATORY AND INJUNCTIVE

RELIEF)

10. Plaintiff realleges each and every material allegation contained paragraphs 1 through 9 above as if fully set forth herein.

11. On or about April 2nd, 2004, Plaintiff qualified to run for Circuit Judge, Place 4, in Shelby County, Alabama, and, thereafter, began to campaign for the seat, including posting signs outside her office in Alabaster, Alabama. Members of Plaintiff=s campaign committee, clients and other supporters have placed signs about and within the city limits of the City of Alabaster, most of the locations of which Plaintiff is unaware.

12. Beginning in or about April, 2004, Plaintiff

displayed a political campaign sign on the sidewalk in front of her office at 122 Main Street, (Highway 31, South), Alabaster, Alabama. Said sign was a stand-alone, upside down AV@-shaped sign about 6 feet high and 3 feet wide with two smaller "Donna J. Beaulieu for Circuit Judge" signs on both sides.

13. On or about June 18, 2004, Plaintiff received a notice from the Defendant, City of Alabaster, that her sign was in violation of the Defendant City's sign ordinance and gave Plaintiff ten (10) days to correct the violation to avoid further legal action. (The June 18, 2004, notice and cited ordinance provided by the City therewith are attached hereto as Exhibit "A").

14. The violation cited was that Plaintiff's sign was only permitted in a residential zoning district on property

which is improved with a dwelling. Plaintiff's property is a commercial place of business. However, signs for various other candidates and commercial signs appear throughout the city in non-residential areas and they are not being removed. Plaintiff is being cited based upon the content of her signs.

15. Defendant's sign ordinance (#03-010, Sec. 15.0) purports to regulate political signs in the City in the interest of improving the appearance and the quality of life of citizens and in an effort to recruit new businesses.

16. Plaintiff removed the sign on June 28, 2004. However, a sign of the same dimensions and shape, but containing commercial speech - advertising a shop and in dilapidated condition- remains 40 feet up the street from Plaintiff's place of business

17. On or about July 15, 2004, Defendant Officer

Brandenburg came to Plaintiff's office and hand delivered another 10-day notice citing Plaintiff with further violations and advised that if they were not removed within the ten days that Plaintiff would be arrested and/or fined. (The notice July 15, 2004, notice and cited ordinance provided by the City is attached hereto as Exhibit "B").

18. The July 15th notice cited and Defendant Brandenburg informed Plaintiff that she had posted signs on public rights-of-way and on trees and utility poles in violation of the ordinance and the Plaintiff had failed to remove signs within ten days of her election.

19. The ordinance prevents the posting of political signs not only on trees and utility poles on public property but also on private property. It affects the free speech rights of all private citizens and, hence, applies unconstitutionally

to citizens not before this Court as contemplated in the overbreadth doctrine.

20. Plaintiff informed Defendant Brandenburg that she did post any such signs, did not know who did and did not know where they were. Plaintiff asked said Defendant for a list of where the signs were and he informed that they were "all over the city."

21. Defendant City's ordinance does not expressly make Plaintiff responsible for the placement/removal of all political signs and Plaintiff cannot comply with the removal provision of ordinance without sufficient information as to whereabouts of the signs. In fact, the ordinance advises that the City will take them down, if necessary, and will simply charge the alleged violator for the cost of removal.

22. Defendant City's ordinance also limits the size

of temporary political signs, i.e., non-commercial signs, to ten feet in height or to a total 32 square feet of sign face while treating commercial signs differently in Section 15.3(D) by allowing temporary commercial signs to have 48 square feet of sign face. [Section 15.3 (D) is attached hereto as Exhibit "C"].

23. Defendants' enforcement officer has further advised that Plaintiff is not allowed to place a permanent political sign of the same dimensions of the commercial sign that is on the font of Plaintiff's building now. Thus, a permit submitted to the city for a political sign would not be approved. The permit requirement is a prior restraint of free speech and allows unfettered discretion to the City. The entire ordinance is due to be struck down as per the opinion of the 11th Circuit in Café Erotica v. St. John's County, FL,

Eleventh Cir. No. 02-26718, February 23, 2004. 2004 U.S. App. Lexis 3243.

24. Defendants' ordinance impermissibly regulates signs based on their subject matter and this not only has the effect of favoring commercial speech over political speech/non-commercial speech, but also serves to favor some candidates over others by restricting a non-incumbent's accessibility to the public eye in public places by disallowing affordable, highly visible yard signs.

25. Plaintiff also informed Defendant Brandenburg that she was not in violation of the ordinance as to the post-election provision as she had not had her election yet as she was on the ballot for November 2, 2004. Plaintiff also informed said Defendant that the sign ordinance was unconstitutional.

26. Plaintiff provided a notice of intent to sue the City on July 16, 2004, advising that the sign ordinance was unconstitutional and in violation of her constitutional rights.

27. Plaintiff has seen other violations of Defendants' ordinance which are not receiving the same violation enforcement and Plaintiff has seen commercial speech specifically favored over Plaintiff's non-commercial speech.

28. Plaintiff asserts that Defendants' sign ordinance is unconstitutional as follows:

a) On its face as it is overbroad;

b) On its face under the opinion espoused by the 11th Circuit Court of Appeals in Café Erotica v. St. John's County, FL, Eleventh Cir. No. 02-26718, February 23, 2004, 2004 U.S. App. Lexis 3243.

c) On its face as it is content-based and creates an undue burden on and prior restraint of free speech;

d) On its face as it is content-based because other sections of the sign ordinance favor commercial over noncommercial speech;

e) On its face as it distinguishes between permissible and impermissible signs on the basis of the sign's content and subject matter and there is no compelling governmental interest, express or implied, justifying such discrimination;

(f) It restricts speech based on content even if it is applied in a content-neutral fashion;

(g) It is not narrowly tailored to further a substantial governmental interest and ample alternative means for communicating the desired message do not exist;

(h) Requiring a private citizen to remove political signs from trees on their own private property imposes further undue burden on the right to free speech and constitutes a governmental taking of a citizens property under the 14th Amendment;

29. Plaintiff further asserts that the sign ordinance and Defendants' enforcement thereof deprives Plaintiff of and violates Plaintiff's right of free speech, right to due process and right to equal protection under the laws (in that ordinance is being selectively enforced and Plaintiff's signs are being regulated while others in her community are not so regulated), and violates the right of privacy and the takings clause of the 14th Amendment.

30. In support hereof, Plaintiff, Donna J. Beaulieu, hereby makes and adopts her Affidavit (attached

hereto as Exhibit "D") and incorporates the same as fully set forth herein.

31. Other than the declaratory judgment requested hereinbelow, Plaintiff avers that she has no other adequate remedy at law.

32. Plaintiff avers that she will suffer irreparable injury and harm without the relief requested hereinbelow.

33. Other than the declaratory judgment requested herein, Plaintiff avers that she has no other adequate remedy at law.

34. Plaintiff avers that the requested relief will not substantially injure another party and the public interest will be furthered by the granting of the requested relief.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Honorable Court will:

a) Take jurisdiction of this matter;

b) Enter an order, after any hearing on the merits as required by this Court, declaring the sign ordinance as a whole, and/or any applicable provisions thereof, unconstitutional, void and of no effect as a matter of law;

c) Enter and order declaring that the actions taken by the Defendants infringed upon Plaintiff's constitutional rights as spelled out in this Complaint and that anticipated actions of the Defendants in the future would further infringe on Plaintiff's constitutional rights; and

d) Enter and order prohibiting the Defendants from further implementing, facilitating or otherwise enforcing the sign ordinance made the subject of this suit against your Plaintiff, as well as prohibiting the further execution of any citation heretofore issued by Defendants to

the Plaintiff and prohibiting any arrest or fining of Plaintiff thereunder;

e) Award Plaintiff costs of this action; and

f) Any and all other such other, further, or different relief to which she may be entitled.

Respectfully Submitted,

BY: /s/ Donna J. Beaulieu
Donna J. Beaulieu, Attorney at Law, Pro Se
P.O. Box 357
Saginaw, AL 35137
Tel: (205) 621-0085

Plaintiff's Address:
P.O. Box 357
Saginaw, AL 35137

Serve Defendants, City of Alabaster, by and through Mayor David Frings, and Mayor David Frings in his official capacity as Mayor via certified mail at:
201 1st Street, North
Alabaster, AL 35007

Serve Defendant, Alabaster City Council, by and through its President, Rick Walters, via certified mail at:
201 1st Street, North
Alabaster, AL 35007

Serve Defendant, City of Alabaster Police Department, and Defendant Officer B. Brandenberg, in his capacity as law enforcement officer and employee of the City of Alabaster, via certified mail at:
201 1st Street North
Alabaster, AL 35007

APPENDIX G

CITY OF ALABASTER
ORDINANCE NO. 03-010

AN ORDINANCE, IN PURSUANCE OF THE AUTHORITY GRANTED BY TITLE 11, CHAPTER 52, ARTICLE 4, CODE OF ALABAMA, 1975, AS AMENDED AND SUPPLANTED BY ALL APPLICABLE LAWS TO AMEND THE ZONING ORDINANCE OF ALABASTER, ALABAMA, TO UPDATE AND REVISE THOSE PROVISIONS OF THE ZONING ORDINANCE RELATED TO ADVERTISING SIGN.

THE PUBLIC WELFARE REQUIRING IT, be it ordained by the City of Alabaster, Alabama, as follows:

Section 1. AMENDMENTS TO ARTICLE III, ADMINISTRATIVE PROVISIONS

Article III of the Zoning Ordinance, entitled "Administration and Review Procedures," is amended as follows:

A. Sub-section 1.1 shall be amended to read as follows:

Building permit. It shall be unlawful to commence the construction of any building or other structure, including accessory structures, or to store building materials or erect temporary field offices, or to commence the moving, alteration, or repair of any structure, including accessory structure, until the Building Official of the City has issued for such work a building permit including a statement that the plans, specifications and, intended use of such structure

in all respects conform with the provisions of this Ordinance. This permit requirement shall apply to signs requiring a permit in accordance with the provisions of Article X. Application for a building permit shall be made to the Building Official of the City on forms provided for that purpose. Building permits shall not be required for any construction, or alteration the cost of which is less than one thousand dollars ($1,000.00). Every building permit issued shall become invalid unless the work authorized by such permit is commenced within six months after its issuance, or if the work authorized by such permit is suspended or abandoned for a period of six months after the time the work is commenced.

B. The introductory paragraph of sub-section 1.2 shall be amended to read as follows:

Review of building permit applications. It shall be unlawful for the Building Official of the City to approve any plans or issue a building permit for any excavation or construction until he has inspected such plans in detail and found them in conformity with this Ordinance. The review of applications for building permits for signs shall be in accordance with Article X, Sect. 2; the review of all other applications for building permits shall be in accordance with this section. The plan accompanying an application for a building permit (other than a sign permit) shall include:

Section 2. AMENDMENTS TO DEFINITIONS

A. Section 3 of said Article III, containing "Definitions," is amended by adding to the alphabetical list of definitions, in alphabetical order, the following definitions:

Commercial Message. Any sign, wording, logo, or other representation that, directly or indirectly, names, advertises or calls attention to a business, product, service or other commercial activity.

Legible: A message is "legible" if it can be read or understood by a person of ordinary eyesight wearing any corrective lenses required for an Alabama driver's license but with no other aids to vision, where such person is between 5 feet and 6 feet in height and is standing at grade level at the location from which "legibility" is to be determined.

Sign, instructional: A sign, generally informational, that has a purpose secondary to the use of the development site on which it is located. This category includes but is not limited to signs with non-commercial messages such as "no parking," "entrance," "loading only," "telephone," and similar information and directives. No sign with a commercial message legible from a position off the development site on which the sign is located shall be considered Instructional.

B. The definitions of "Sign" and "Sign, Portable," shall be amended to read as follows:

Sign: A device, fixture, placard, or structure that uses any form, color, graphic, illumination, symbol or writing which directs attention to an object, product, place, activity, facility, service, event, attraction, person, institution, organization or business, or to communicate information of any kind to the public and which is legible from any street, right-of-way, sidewalk, alley, park or other public property.

Sign, portable: Any sign not attached to the ground or other permanent structure or a sign designed to be transported, including, but not limited to, signs designed to be transported by means of wheels; signs made as A-frames or T-frames; menu and sandwich board signs; balloons used as signs; umbrellas used for commercial messages; and signs attached to or painted on vehicles parked and visible from the public right-of-way, unless said vehicle is used in the normal day-to-day operations of the business..

C. The definitions of "Directional Sign," "Indirectly Illuminated Sign," and "Internally Illuminated Sign" shall be amended to read as follows and inserted in the appropriate place in the alphabetical list, based on the new label.

Sign, directional: Any sign which serves solely to designate the location or direction of any place or area.

Sign, Indirectly Illuminated. A sign which is

illuminated by a light source which is external to the sign cabinet or structure.

Sign, Internally Illuminated. A sign which is illuminated by a light source which is behind the sign face.

Section 3. AMENDMENTS TO ARTICLE X

Article X, "Sign Regulations," is repealed and reenacted to read as follows:

Purposes

1.1 The purposes of these sign regulations are:

1. to encourage the effective use of signs as a means of communication for businesses, organizations and individuals in Alabaster;
2. to provide a means of way-finding in the community, thus reducing traffic confusion and congestion;
3. to provide a means for businesses located in Alabaster to identify their respective locations and businesses and to advertise products and services available at that location;
4. to reduce the proliferation of signs and the resulting clutter by restricting most new commercial signs to the premises of the business, allowing off-premise signs only along already commercial sections of major roads through the City;
5. to maintain and enhance the pleasing look of the

City of Alabaster and to preserve Alabaster as a city that is attractive to business;

6. to improve pedestrian and traffic safety;
7. to differentiate among those signs that, because of their location, may distract drivers on public streets and those that may provide information to them while they remain in their cars but out of active traffic;
8. to minimize the possible adverse effects of signs on nearby public and private property;
9. to ensure that residents of the community continue to have the opportunity to express their views on public issues through signs located at their residences;
10. to ensure that persons seeking housing in Alabaster can easily find available housing by allowing commercial real estate signs in locations and circumstances where other commercial signs are not allowed; and
11. to implement the comprehensive plan of the City as updated from time to time.

Section 3.2. Permits, fees, and inspections.

2.1 *Permits required.* Except as otherwise provided in this Article it shall be unlawful for any person to erect, construct, enlarge, move, alter or convert any sign in the City or cause the same to be done, without first obtaining a building permit for each sign from the Building Official as required by this Ordinance. Permits are not required for routine sign maintenance. Any business, firm, or corporation engaged in the

business of altering or erecting signs governed by the provisions of this Article shall first obtain a business license from the City.

2.2 *Application for permit.* Application for a permit to erect a permanent sign or to erect a temporary sign as stipulated in Sub Section 12.3 of this Article, shall be made to the Building Official upon a form provided by the Building Official and shall be accompanied by such information as may be required to assure compliance with all appropriate laws and regulations of the City, including:

A. Name and address of owner of the sign.

B. Name and address of owner or the person in possession of the premises where the sign is located or to be located.

C. Clear and legible drawings showing the location of the sign which is subject to the permit and all other existing signs on the premises.

D. Drawings showing the dimensions, construction supports, size, electrical wiring and component materials of the sign and method of attachment.

E. In the case of a temporary sign, the date on which the sign will be erected and the date when the sign shall be removed.

2.3 *Time Limits.* Within five business days of receiving an application for a sign permit, the Building Official shall review it for completeness. If the Building Official finds that it is complete,

the application shall then be processed. If the Building Official finds that it is incomplete, the Building Official shall within such five-day period, send to the applicant a notice of the specific ways in which the application is deficient, with appropriate references to the applicable subsections of this Ordinance. Within seven days of the submission of a complete application for a sign permit, the Building Official shall either:

A. Issue the sign permit, if the sign(s) that is or are the subject of the application conform in every respect with the requirements of this Ordinance and other provisions of the City ordinances; or

B. Deny the sign permit if the sign(s) that is or are the subject of the application fail(s) in any way to conform to the requirements of this Ordinance or other provisions of the City ordinances. In case of a denial, the Building Official shall specify in the rejection the subsection of this Ordinance or other applicable ordinance with which the sign(s) is or are inconsistent. Said statement shall be attached to the permit application.

2.4 *Appeals of permit denial.* Appeal may be taken to the Board of Adjustment upon denial of a building permit by the Building Official.

2.5 *Permit fees.* Application for permits shall be filed with the Building Official, together with a permit fee, as specified by the Building Official for each sign in accordance with this Ordinance. Building

permit fees for signs shall be determined in the same manner as other building permits issued by the City.

2.6 *Inspection of signs.* The person erecting, altering, relocating, enlarging or converting any sign shall notify the Building Official upon completion of the work for which permits are required and issued. All free standing signs shall be subject to a footing inspection and all signs to an electrical inspection by the Building Official.

2.7 *Unlawful signs.* Every sign in the City shall be maintained in sound structural condition. The Building Official may inspect any sign and shall have the authority to order the painting, repair, alteration or removal of any sign which does not comply with the Building Code, is abandoned for a period of thirty (30) days or more, or advertises a business, place or event which has moved from the premises or no longer exists. Sign removal shall be at the sign owner's expense. The owner of any such sign or the premises on which it is located may appeal such an order to the Board of Adjustment, and enforcement of the order shall be suspended pending a ruling from that Board.

Section 3.3. Signs permitted in the A, E, R-1, R-2, R-3, R-4, R-5, R-7 and R-8 districts.

A. *Single family residential subdivisions*

1. Maximum number: one per side of a public street entrance or one sign in a landscaped median of the public street entrance

2. Where permitted: Each sign shall not exceed nor in height and shall be located so as not to cause a safety hazard. Signs located in a landscaped median of a public street shall only be permitted when shown on a subdivision plat or street plan approved by the Planning Commission as part of the subdivision or street approval process.

3. Maximum area: thirty two (32) square feet of sign face area

4. Maximum height: six (6) feet

5. Illumination: indirectly illuminated

B. *Special exception uses in the above stated districts*

1. Maximum number: one

2. Types permitted: freestanding sign, building wall sign

3. Maximum area: thirty-two (32) square feet of sign face area

4. Maximum height (freestanding signs): ten (10) feet

C. *Garage and yard sales*

1. Maximum number: one

2. Type permitted: temporary sign

3. Where permitted: on the premises

4. Maximum area: four square feet of sign face area

5. Illumination: non-illuminated

Section 3.4. Signs permitted in the R-6 and MHD districts.

A. Maximum number: one per public street entrance

B. Type permitted: free standing

C. Where permitted: may be erected in the landscaped median of a public Street when shown on a subdivision plat or Street plan approved by the Planning Commission as part of the subdivision or street approval process

D. Maximum area: thirty-two (32) square feet of sign face area

E. Maximum height: eight (8) feet

F. Illumination: indirectly illuminated

Section 3.5. Signs permitted in the Institution, B-1, B-4, M-1 and M-2 districts

A. *Signs Permitted for Individual Buildings*

1. Buildings with less than twenty thousand (20,000) square feet of floor area

   a. Maximum number: one

   b. Types permitted: freestanding sign, building wall sign, canopy sign

   c. Maximum area: thirty two (32) square feet of sign face area (freestanding sign); twenty (20) square feet of sign face area (building wall or canopy sign)

   d. Maximum height (freestanding sign): four (4) feet

   e. Illumination: indirectly illuminated

2. Buildings with more than twenty thousand (20,000), but less than one hundred thousand (100,000) square feet of floor area

   a. Maximum number: one free-standing sign and one building wall sign or one canopy sign

   b. Types permitted: freestanding, building wall or canopy sign

   c. Maximum area: thirty two (32) square feet of sign face area (freestanding sign); twenty (20) square feet of sign face area (building wall or canopy sign)

   d. Maximum height (freestanding sign): four (4) feet

   e. Illumination: indirectly illuminated

3. Buildings with more than one hundred thousand (100,000) square feet of floor area

a. Maximum number:

b. Types permitted:

c. Maximum area:

d. Maximum height (freestanding sign):

e. Illumination: permitted one indirectly illuminated free-standing sign not to exceed four (4) feet in height nor eighty (80) square feet of sign face area, and one building wall sign or one canopy sign not to exceed a maximum of sixty (60) square feet of sign face area.

4. An office building with a retail tenant(s) shall incorporate signs for the retail tenant(s) into the type of sign and sign face area permitted for the office building.

B. Office park, industrial park and institution campus which contains more than five (5) buildings, other than accessory buildings

1. Maximum number: one per public street entrance

2. Type permitted: free-standing sign which identifies the name of the park or campus

3. Maximum height: four (4) feet

4. Maximum area:

a. Internally illuminated signs: 32 square feet; 100 square feet for developments with buildings which contain a total of more than 500,000 square feet of gross floor area

b. Indirectly or non-illuminated signs: 60 square feet; 120 square feet for developments with buildings which contain a total of more than 500,000 square feet of gross floor area

Section 3.6. Signs permitted in the B-2 District

A. Non-retail uses which are permitted or special exception uses in the residential districts, the Institution District or the B-1 District are permitted signs as stipulated for that use in the applicable Section of this Article.

B. *Non-retail establishments which are not a permitted or special exception use in the residential districts, the Institution District or the B-1 District*

1. Maximum number: one (1)

2. Types permitted: building wall sign or canopy sign

3. Maximum area: twenty (20) square feet of sign face area.

C. *Free standing retail structure*

1. Maximum number: one

2. Types permitted: free standing sign, building wall signs, canopy signs or projecting signs

3. Maximum area (freestanding sign): one hundred twenty (120) square feet of sign face area

4. Maximum height (freestanding sign): twenty four (24) feet

D. *Retail establishment located in a shopping center*

1. Types permitted: building wall signs or projecting signs.

E. *Shopping center*

1. Maximum number: one

2. Type permitted: shopping center identification sign

3. Maximum height: thirty five (35) feet

4. Maximum area: one hundred twenty (120) square feet of sign face area.

Section 3.7. Signs permitted in the B-3 District

A. *Non-retail uses which are not located in a shopping center:*

1. Non-retail uses which are permitted or special exception uses in the residential districts, the Institution District or the B-1 District are

permitted signs stipulated for that use in the applicable Section of this Article.

2. Non-retail establishments with less than ten thousand (10,000) square feet of floor area, which are not a permitted or special exception use in the residential districts, the institution District or the B-1 District

   a. Maximum number: one (1) building wall sign or one canopy sign and one free standing sign

   b. Maximum area: twenty (20) square feet of sign face area (building wall or canopy sign); 32 square feet of sign face area (freestanding sign)

3. Non-retail establishments with more than ten thousand (10,000) square feet of floor area, which are not a permitted or special exception use in the residential districts, the Institution District or the B-1 District

   a. Maximum number: one (1) building wall sign or one canopy sign and one (1) free standing sign

   b. Maximum area: twenty (20) feet of sign face area (building wall or canopy sign); sixty (60) square feet of sign face area (freestanding sign).

   c. Maximum height: four (4) feet

B. Non-retail uses located in a shopping center may have signs as permitted for retail uses located in a shopping center.

C. *Free standing retail structure*

1. Maximum number: one free standing sign

2. Types permitted: free standing sign, building wall signs, canopy signs or projecting signs

3. Maximum area (freestanding sign): thirty five (35) feet

4. Maximum height (freestanding sign): one hundred twenty (120) square feet of sign face area

D. *Retail establishment located in a shopping center*

1. Types permitted: building wall signs, canopy signs or projecting signs.

E. *Shopping center*

1. Maximum number: one

2. Type permitted: free standing sign

3. Maximum area: one hundred twenty (120) square feet of sign face area.

4. Maximum height: thirty five (35) feet

F. *Gasoline service stations, in addition to other permitted signs, are permitted*:

1. Signs stating the price of gasoline:

a. Maximum number: Two (2)

b. Maximum area: twelve (12) square feet of sign face area.

2. Canopy and spandrels:

a. Maximum area: seventy-six (76) square feet of sign face area for the first six (6) pumps or multiple dispensing units and an additional twenty-eight (28) square feet for each additional island of two (2) or more pumps or multiple dispensing units.

b. Additional requirements: The signs shall be constructed as an integral part of the canopy and spandrel structures and shall not extend above the roof-line of the canopy. Sign face area on the canopy and spandrels shall be the smallest geometric figure which describes the area enclosed by the actual copy of the signs, not the entire area of the canopy face or spandrel.

3. Car wash:

a. Maximum number: one

b. Type permitted: building wall sign.

c. Maximum area: twenty-four (24) square feet of sign face area

G. Automobile dealerships

1. Because of the number of automobile dealerships located in the City of Alabaster and their unique sign requirements, sign regulations for automobile dealerships with one franchise on the premises are as follows:

Signs Permitted for Automobile Dealerships in the B-3 District				
	Auto Dealership With Less Than 30,000 Square Feet of Floor Area		Auto Dealership With More than 30,000 Square Feet of Floor Area	
Type Sign Permitted	Building Wall or Canopy Sign	Free Standing Sign	Building Wall or Canopy Sign	Free Standing Sign
Sign Face Area (Square Feet)	100	220*	100	380*
Maximum Height	Top of Building Wall	40 Feet	Top of Building Wall	45 feet
Maximum Number	N/A	Three	N/A	Three

* Permitted free-standing sign sign face area may be applied to permitted building wall sign or canopy sign face area. The maximum sign face area of a free-standing sign shall be two hundred sixty (260) square feet.

2. Automobile dealerships with more than one automobile franchise may increase the permitted sign face area for building wall and free-standing signs by thirty-three (33) per cent and the maximum number of free-standing signs by two (2), for each additional automobile franchise on the premises; except that no automobile dealership with floor area less than thirty thousand (30,000) square feet may have more than five hundred forty (540) square feet of total sign face area and no dealership with floor area greater than thirty thousand (30,000) square feet may have more than eight hundred (800) square feet of total sign face area.

Section 3.8. Signs permitted in the B-5 District

A. *Business or other use*

1. Maximum number: one per facing street.

2. Types permitted: building wall sign, canopy sign or projecting sign

3. Maximum area:

   a. Canopy sign or projecting sign: thirty-two (32) square feet.

   b. Building wall sign: ten (10) percent of the front building wall area or portion thereof, which encloses the business or other use.

B. *Movie theater*

1. Maximum number: one

2. Types permitted: may have any of the signs listed in A, above, or marquee sign

3. Maximum area (marquee sign): twenty (20) percent of the front building wall area or portion thereof, which encloses the theater.

Section 3.9. Signs permitted in the Planned Development District (PDD)

Minimum standards for signs in each PDD shall be set forth in the development criteria of the PDD, as approved by the City during the review and approval process. The standards shall not be less restrictive than the applicable regulations of this Article. Off-premise signs are prohibited in a PDD.

Section 3.10. Free-standing signs, generally.

A. No sign shall cause a public hazard, obstruct or impair motorists' vision, diminish safe ingress and egress to any property or impede flow of pedestrian or vehicular circulation in parking areas, sidewalks, or public roads. Except for the supporting structure, no sign may obstruct driver or pedestrian visibility between four (4) feet and ten (10) feet above the ground, measured from the base of the sign.

B. The height of a free standing sign shall be measured from the average elevation of the ground at the base of the sign to the highest point of the sign structure. Berms or fill material which raise the base of the sign above the average elevation of the surrounding ground,

shall not be used to increase the height of a free standing sign.

Section 3.11. Off Premise Signs

A. Off-premise signs, except as provided herein, are prohibited.

B. Off-premise signs are only permitted in the B-3, B-4, M-1 and M-2 districts, on parcels which abut the Interstate Highway 65 right-of-way, and oriented so as to be viewed from the main traveling lanes of interstate Highway 65.

C. No off-premise sign shall be erected closer than 500 feet from a residential district boundary, measured from nearest edge of the sign.

D. Any illumination for an off-premise sign shall be focused upon the sign face and shall not be directed toward a residential district

E. No portion of an off-premise sign shall encroach or project over any public property or right-of-way.

F. There shall be at least fifteen hundred (1,500) feet between off-premise sign structures on the same side of the highway.

G. Maximum sign face area for an off-premise sign shall be 800 square feet. Maximum height of the sign shall be 30 feet for signs located on an elevated grade and 40 feet in all other locations.

H. Each off-premise sign shall be set back at least thirty (30) feet from any public right-of-way and property line.

Section 3.12. Substitution of Messages

Any sign allowed under this Ordinance may contain, in lieu of any other message or copy, any lawful noncommercial message that does not direct attention to a business operated for profit, or to a product, commodity or service for sale or lease, or to any other commercial interest or activity, so long as said sign complies with the size, height, area and other requirements of this Ordinance.

Section 3.13. Signs Permitted in Public Right-of-Way

The following signs, and only the following signs, may be placed or erected in the public right-of-way. Such signs, if erected by or at the request of any entity other than an agency of the State of Alabama, Shelby County, or the City of Alabaster, shall be allowed under a license, which may be revoked by the City at any time, with or without cause, with or without notice, and without compensation to the entity placing or using the sign. The signs permitted under this section are:

A. Signs erected by the Alabama Department of Transportation along a state highway or other state road;

B. Traffic signs erected by the City and, when erected, conforming to the standards set forth in the Uniform Manual of Traffic Control Devices;

C. Public notices placed by a public agency acting under lawful court order or in accordance with mandatory provisions of Alabama state law;

D. Signs erected by a public or regulated mass transit service along its routes, identifying the location of bus or transit stops and providing schedule information, provided that

no such sign shall exceed two square feet in area;

E. Signs erected by a public utility company on its poles, above its underground facilities, or on its other facilities in the right-of-way, and providing safety or other information about the facility, provided that no such sign shall exceed two square feet in area;

F. Signs erected by the City at the request of a non-profit organization, subject to the following conditions:

1. Such signs shall be available only to organizations approved for deductions under Section 501(c)(3) of the Internal Revenue Code;

2. Such signs shall provide directions to a permanent facility of the non-profit organization, which facility is located in the City of Alabaster and is open to and serves the public; and

3. No such sign shall be larger than two square feet in area.

Section 3.14. Signs Prohibited

The following signs are prohibited, unless otherwise exempted or permitted by this Article.

A. Signs which do not comply with the adopted building, electrical or fire codes;

B. Any sign which constitutes a safety hazard, including signs which obstruct visibility at intersections.

C. Portable signs and any other signs which are not permanently attached to the ground or a building, except for those expressly permitted as "temporary signs" under Section 15.3;

D. Signs located in the public right-of-way, except those signs permitted in accordance with Section 13;

E. Signs attached to trees, utility poles, or other structures located in the public right-of-way, except for instructional signs posted by the owner of a pole or other structure;

F. Animated signs, including signs which move, revolve, rotate, or appear to be animated by mechanical, electronic or other means;

G. Signs with flashing, blinking, moving or intermittent light or with light which varies in intensity or color, except time and temperature signs;

H. Strings of light bulbs, inflatable signs, and signs which emit noise, odor or visible matter such as smoke or steam;

1. Wind driven signs including banners, pennants, ribbons, spinners, streamers, captive balloons and similar devices; this restriction does not apply to flags permitted in accordance with Section 13.2.E;

2. Roof signs; and

3. Off premise signs, except as permitted in Section 11.0 of this Article.

Section 3.15. Permit exceptions, signs allowed without a permit and temporary signs.

15.1 Permit exceptions.

No permit shall be required for the following work on signs which otherwise require a permit:

A. Changing of the advertising copy of message on an existing approved sign or marquee which is specifically designed for the use of replaceable copy.

B. Painting, cleaning or other normal maintenance and repair of a sign not involving structural changes.

15.2 Signs allowed without a permit.

The following signs shall be allowed, subject to the following conditions, but no sign permit shall be required for such signs:

A. Signs posted by a public agency, acting in accordance with an adopted law or ordinance,;

B. Directional signs which do not exceed four (4) square feet of sign face area nor three (3) feet in height, located in a parking area or private drive, which are intended to direct traffic through the area and do not contain any commercial message.

C. Signs which are incorporated into vending machines by a manufacturer or distributor which identify or advertise only the product or service dispensed by the machine and which are not legible from the public right-of-way or

other site not part of the lot on which the vending machine is located.

D. A sign indicating that the property on which the sign is located has received a property-related award from a non-profit organization holding tax exempt status under Sect. 501(c)(3) of the Internal Revenue Code and with an office or other principal location in Alabaster.

E. Political campaign signs, subject to the following:

1. Political signs shall only be located in a residential zoning district on property which is improved with a dwelling.

2. Political signs shall not exceed ten (10) feet in height nor thirty-two (32) square feet in sign face area.

3. Political signs shall not be separately illuminated.

4. Owners of residential property may place or grant permission for the placement of political signs in their respective yards, provided that no sign shall be placed in a public right-of-way.

5. Political signs shall not be placed in a public right-of-way or on any utility pole or tree, whether on public or private property.

6. Political signs related to an election or other particular event shall be removed within ten

(10) days following the election or other event. If a sign related to an election or a particular event is not removed by such time, the City may remove the signs at the expense of the named candidate, other sponsor or the owner of the property on which the sign is located.

F. Building marker signs shall be permitted, subject to the following conditions:

1. Such signs shall not exceed three square feet in area,

2. Such signs shall contain no logo or commercial message,

3. Such signs shall be made of permanent material, such as bronze or masonry, and shall be permanently affixed to or made part of the building, and

4. There shall be only one such sign on any building.

G. The display of flags shall be subject to the following limitations:

1. There shall be no more than one flagpole per principal building on any development site;

2. Each flagpole must be within thirty (30) feet of the principal entrance to the building to which it is oriented,

3. There shall be no more than one flag per pole,

4. No flag shall be larger than five feet by eight feet,

5. No flag may contain a commercial message,

6. No flagpole in a residential district shall exceed twenty (20) feet in height; no flagpole in a nonresidential district shall exceed thirty (30) feet in height, and

7. A flagpole shall be have a setback of at least 5 feet from any property line,

8. No rooftop flagpoles shall be permitted in any zoning district.

H. Instructional signs may be displayed, subject to the following. Such signs shall not be larger than 4 square feet and, if freestanding, shall not exceed 3 feet in height. Instructional signs may carry any type of information except a commercial message. Typical instructional signs include, but are not limited to, "restroom," "phone," "no parking," "entrance," "exit," and generic directions such as "office," "atm," or "stores." No such sign shall carry any commercial message whatsoever.

I. Holiday Decorations may be displayed for a period of not more than forty-five (45) consecutive days nor more than sixty (60) days

in any one (1) year. Holiday decorations shall not contain a commercial message.

15.3 Temporary signs.

A. .Temporary signs shall not be located in the public right-of-way.

B. .A non-profit organization recognized by the Internal Revenue Service under Sect. 501(c)(3) of the Internal Revenue Code, may have a maximum of four (4) temporary signs, for a period of not more than thirty (30) days during any calendar year, which announce events or meetings of that organization.

C. .Each new business may have one temporary sign, not to exceed thirty-two (32) square feet of sign face area. The sign is permitted for a period not to exceed sixty (60) days, or until a permanent sign is erected, whichever time period is shorter.

D. Commercial property may have one, non-illuminated, free standing, temporary identification sign per facing street, while the property is being developed, which shall not exceed 48 square feet of sign face area nor 10 feet in height. For a single tenant project, the sign shall be removed when the project is complete, or the permanent sign has been erected, whichever occurs first. For multi-tenant projects, the sign shall be removed when 75 percent of the tenant spaces have been leased, or the permanent sign has been erected, whichever occurs first.

E. As an accessory commercial use to a temporary sales office or model home located

in a new residential subdivision with five (5) or more lots, there may be one temporary identification sign while the subdivision is being developed, which shall not exceed thirty-two (32) square feet nor ten (10) feet in height. The sign shall not be illuminated and shall be removed when seventy-five (75) percent of the homes in subdivision have been constructed or the permanent subdivision identification sign is erected, whichever occurs first.

F. Real estate signs:

1. Each residential lot may have one "for sale" or "for rent" sign for residential property, provided such sign is located on the lot and does not exceed four (4) square feet of sign face area. The sign shall be removed when the property is sold or rented.

2. Any person attempting to sell or rent a residential unit in a residential district, or such person's agent, may install off-premise signs advertising the sale or rental of such property, subject to the following conditions:

a. Each such sign shall be have a sign face of two square feet or less;

b. No such sign shall be installed on the public right-of-way;

c. Such sign may be installed only on private property, with the express permission of the property owner; and

d. Such sign(s) shall be displayed only between 3 p.m. on a Friday afternoon and 5 p.m. on the following Sunday evening. Any such sign not removed by 5 p.m. on Sunday shall be deemed abandoned and may be removed and discarded by the City, in addition to the imposition of penalties or other enforcement actions under this Ordinance.

3. Each commercial lot, building or tenant space may have one real estate "for sale" or "for rent" sign, provided such sign is located on the subject lot or premises and does not exceed thirty-two (32) square feet of sign face area. The sign shall be removed when the property or premises is sold or rented.

Section 3.16. Nonconforming signs.

All signs constructed after adoption of this Ordinance shall conform in all respects to the requirements and provisions contained herein. Within the districts established by this Ordinance or amendments that may later be adopted, there exists signs which were lawful before the Ordinance was passed or amended, but which would be prohibited, regulated or restricted under the terms of the Ordinance or future amendment. It is the intent of this Ordinance to permit these nonconforming signs to remain until they are removed, discontinued or altered, but not to encourage their survival.

16.1 *Nonconforming on-premise signs*

A. Non-conforming signs which are structurally altered shall, upon completion of the alteration, conform in all respects to the provisions of this Ordinance.

B. Nonconforming signs shall be maintained, if a structural alteration is required to accomplish maintenance, the sign shall, upon completion of the alteration, conform in all respects to the provisions of this Ordinance.

C. The sign face area of an internally illuminated, nonconforming sign may be removed from the sign structure without jeopardizing the legal nonconforming status of the sign.

D. Maintenance of sign face area on a nonconforming sign in which the sign face area is an integral and permanent part of the sign structure, shall require the sign to conform in all respects to the provisions of this Ordinance.

16.2 *Nonconforming off-premise signs.* Structural alteration of a nonconforming off-premise sign shall require its removal. The message of a nonconforming off-premise sign may change without affecting the legal nonconforming status of the sign.

16.3 *Restoration after damages.* A nonconforming sign which is damaged by fire, wind, or other causes, to the extent that repair of the sign requires structural alteration, or the extent of the damage is more than ten (10) percent of the appraised value of the sign immediately prior to

said damage, shall upon completion of the alteration, conform, in all respects to the provisions of this Ordinance.

16.4 *Abandonment.* Any on premises sign which no longer advertises a bone fide business, institution, person, event, location, product, or service for a continuous period of thirty (30) days or more, shall be altered or removed to conform in all respects to the provisions of this Ordinance within thirty (30) days following notification of abandonment.

Section 4. **OTHER EFFECTS**

This Ordinance shall have no effect on provisions of the Zoning Ordinance not specifically amended by its language; all other provisions of the Zoning Ordinance shall remain in full force and effect.

Section 5. Other provisions

A. Effective Date

This Ordinance shall be effective on January 1, 2004.

B. Violations Continue

Any violation of the previous sign regulations of the City will continue to be a violation under this Ordinance and will be subject to penalties and enforcement under the terms of the Zoning Ordinance. The adoption of this Ordinance does not affect nor prevent any pending or future prosecution of, or action to abate, violations of the previous City of

Alabaster ordinances that occurred prior to the adoption of this Ordinance.

C. Applications Submitted Before January 1, 2004

Any sign for which a complete application was submitted to the City before January 1, 2004 and pending approval on January 1, 2004, may, at the applicant's option, be reviewed wholly under the terms of the sign regulations in effect immediately before January 1, 2004. If approved, such sign may be installed and used in accordance with the standards in effect at the time of application. Any re-application for an expired permit shall meet the standards in effect at the time of re-application.

D. Permits Issued Before January 1, 2004

Any sign for which a permit was duly issued before January 1, 2004 may be completed in conformance with the issued permit and other applicable permits and conditions, even if such sign does not fully comply with provisions of this Ordinance. If the installation of the sign is not completed in accordance with the applicable permit terms, the issuing officer may, upon receipt of a written request and payment of the required fee, grant one 6-month time extension. If the installation of the sign is not completed within the time allowed under the original permit or any extension granted, then the sign may be installed or used only in strict

compliance with the requirements of this Ordinance.

E. Severability

If any portion of this Development Code is held to be invalid or unconstitutional by a court of competent jurisdiction, that portion held to be invalid or unconstitutional is to be deemed severed from the Development Code, and in no way affects the validity of any other portion of the Development Code.

SECTION 6. This Ordinance shall become effective upon its passage and adoption by the City Council of the City of Alabaster, Alabama, and as otherwise required by law.

ADOPTED AND APPROVED this 3 day of November, 2003.

Attest: CITY OF ALABASTER, ALABAMA

Marsha Massey /s/ BY Rick Walters /s/

Marsha Massey Rick Walters, Council President

City Clerk

Approved:

David M. Frings /s/

David M. Frings, Mayor

APPENDIX H

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ALABAMA

DONNA J. BEAULIEU, PLAINTIFF,

V.

ALABASTER, CITY OF, a municipal corporation, DAVID FRINGS, Mayor of City of Alabaster, ALABASTER CITY COUNCIL, by and through its president, Rick Walters, CITY OF ALABASTER POLICE DEPARTMENT, BRIAN BRANDENBERG, DEFENDANTS.

NO. CV-04-BE-2211-S

AUGUST 31, 2004

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE KARON O. BOWDRE
UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFF:

DONNA BEAULIEU
P.O. BOX 357
SAGINAW, AL 35137

FOR THE DEFENDANT:

JAMES PORTER, II
BENJAMIN GOLDMAN

PORTER, PORTER & HASSINGER
P.O. BOX 128
BIRMINGHAM, ALABAMA 35203

Court Reporter:
Teresa Roberson, RPR, RMR
Federal Court Reporter
1729 North Fifth Avenue, Suite 325
Birmingham, Alabama 35203
****

PROCEEDINGS

****
(Open Court.)

THE COURT: For the record, and so we won't have to be going back and forth to what the Court has already previously decided, I just want to restate some of the things I stated when we convened last time.

As I stated then, I have concluded that there is no requirement that the plaintiff exhausted administrative remedies as argued by defendant. In Section 1983, claims do not require exhaustion of state remedies to challenge the deprivation of constitutional rights.

Also, the Court has concluded that the plaintiff does in fact have standing to challenge the zoning ordinances that affect the posting of political signs in the City of Alabaster.

As I stated before, the plaintiff has demonstrated injury in the chilling effect on political doctrine. The very existence of the ordinance limiting political speech may cause others not before the court to refrain from exercising that very protected form of speech.

As I stated before, though, finding that the plaintiff has standing does not automatically result in a finding that the plaintiff has established that the ordinance or any part of it was unconstitutional. However, the court notes that the Supreme Court has repeatedly held that political speech carries the highest form of protection afforded by the First Amendment.

Also, the Court has found additional language from a Supreme Court case dealing with the protection of political speech that was not cited by either side. This case is not a

case that involves distinction between commercial and noncommercial speech as much as it involves, in the Court's opinion, limitations on political speech. And the United States Supreme Court stated in McIntyre v. Ohio, elections in 1995 that when a law burdens core political speech, we apply exacting scrutiny and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.

So even though neither side has really argued that that is the appropriate standard, the court finds that that is the appropriate standard to be applied in this case.

As I said, we are talking about a burden on political speech and that is the way we are going to be focusing our attention. As the Supreme Court also said in Buckley v. Ballalo, it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

So our focus today is going to be on limitations on political speech.

Ms. Beaulieu, do you have anything that you would like to present to the Court? And one thing I would like to ask that you do is that you clarify or state clearly for the Court exactly what your position is concerning the ordinance that you are challenging.

MR. PORTER: Your, Honor, if I might. We talked prior to this, and I think we have narrowed the issues.

THE COURT: That is why I was asking the plaintiff to state her position. If y'all have narrowed it, great. We will let her state it since it's her case.

MS. BEAULIEU: Thank you, Your Honor. I want to apologize to the court as well for my lack of performance in our last hearing. I apologize, Your Honor.

THE COURT: I don't think it was a lack of performance as much as it was an illness and we will certainly take no note of that.

MS. BEAULIEU: Thank you. The Court has given this plaintiff a challenge of arguing that the ordinance is

unconstitutional on its face and contains content-based restrictions.

The first thing that I would like to address would be the Section 15.2. (E), which specifically refers to the political campaign signs. Although it is under this section that say – that allows signs without a permit, we are given them that political campaign signs would be allowed without a permit, but the ordinance as written has a but to it, it's subject to a statement that political signs shall only be located in a residential zoning district on property which is improved with a dwelling.

I have spoken with Mr. Porter this morning, my understanding from him is that the city does wish to clarify that so that anyone readings it hopefully from hence forward that that is not – the way it's written is more clear. My understanding from their side is that they're saying that political campaign signs in a residential zoning district on property with a dwelling does not need a permit, as long as

the wording of the ordinance as far as that section is concerned is changed to reflect that and it's not misleading any longer to anyone.

THE COURT: So, in other words, the city has in essence agreed, Mr. Porter, to remove the language that indicates that political signs shall only be located in a residential zoning district?

MR. PORTER: What the city' position is is that we are – if, in fact, the court and the plaintiff are construing that to say that you can only have a political sign in a residential area, we would be glad to clarify. We have the drafter of the ordinance here, Dr. Eric Kelly, who drafted this ordinance, to explain it to the court and also to point out that this ordinance says that without a permit, you can have a political sign in any residential area. It also says with a permit, you can have political speech anywhere.

All that I indicated was, if it would satisfy the plaintiff for us to say, to clarify that, in other words, you read this ordinance as we read it, that that only means that –

THE COURT: As some please in the city read it.

MR. PORTER: Well, again, Dr. Kelly, he is the drafter of it, but being a comprehensive zoning ordinance, what it says and the intent of the city is that with a permit, political signs, with limitation, can be on residential property without any limitations at all.

And if that needs to, if those exact words need to be reiterated in that, then certainly we are willing to do it to read as we interpret it.

THE COURT: Okay. All right. So that takes care of, then, Section 15.2. (E). Is that right?

MR. PORTER: I mean, as I said, we are willing to add the precise language so it will be completely understood that political signs, without permit, are freely located on residential property.

In other words, the evident confusion when it says political signs shall only be located in residential zoning, the ordinance does not say from our standpoint that you can only have political language in a residential zoning.

THE COURT: I appreciate that offer from the city. And I am going to take you up on that. All right. But there is a problem in that both today and when we met before and in your submissions to the court you have argued that the city interprets that provision the way that you have stated it.

However, the June 18th 2004 citation or notice or whatever you want to call it that was given to Ms. Beaulieu that started this stuff specifically says it has come to the attention of the city that your business is displaying a political sign on your property. This is in violation of the sign ordinance with the City of Alabaster. I quote, "the sign ordinance states that political signs may only be displayed in a residential zoning district on property which is improved with a dwelling".

So it's not just the court and Ms. Beaulieu that has interpreted Section 15.2.(E) to preclude political signs in a business district, that is also the way that the enforcement officer interpreted that provision as well.

MR PORTER: Your Honor –

THE COURT: I think it's a bit disingenuous to come in here and argue to the court that the ordinance means something other than what its plain language says when the City has enforced it according to that plain language.

I'm glad that you finally recognize that there is in fact a problem with that language and your ordinance, and I am glad that the City is going to correct that language.

MR. PORTER: Might I respond?

THE COURT: Yes, you may.

MR. PORTER: From the city's standpoint, first of all, that warning that was sent was inaccurate. If he had based it on the fact that you can't have a free standing temporary sign, it would have been fine.

Secondly –

THE COURT: Not necessarily. We will get to that one in a minute.

MR. PORTER: No question that that language was wrong.

Secondly, Steve Sims, who is the building official didn't see that notice before it went out by Officer Brandenburg and, if he had of, it would have been corrected.

Secondly, if there was a problem –

THE COURT: That is why I'm saying that the way it's been enforced – because Officer Brandenburg is the enforcing officer, is he not?

MR. PORTER: He is the code enforcement officer.

THE COURT: He was not enforcing it the way you have been arguing the way the city interprets it.

MR. PORTER: Right. Second point if I might.

THE COURT: Quite frankly, Officer Brandenburg, I understand your position on that because it's in direct

compliance with the exact language of the ordinance itself. Don't let them give you too much grief for the language that you used. You used the language in the ordinance. All right.

Are you through with Secuon 15.2.(E) or .1?

MR. PORTER: There were two other points. I have two other points, if the Court would permit me on that.

One is, Steve Sims, building administrator, will testify that if that had been brought to his attention, if there had been any type of appeal, which they had a right to do to take it to the BZA, that it would not have been interpreted that way.

The second point is that clearly since the filing of this case, it's been reiterated time and again, both at the deposition, both here, both in a letter that was sent to Ms. Beaulieu how the city interprets that, how it intends to enforce that.

In other words, we indicated, tell us where you want your signs up and we will work with you every way that we can to get them up. That is what we have done.

THE COURT: All right. The city, I want to make sure I understood this, is going to change that language that Officer Brandenburg relied on, that Ms. Beaulieu relied on and that the Court read the same way they did, the city is going to change that so that political signs are not only limited to residential sections; is that correct?

MR. PORTER: That interpretation will be changed.

THE COURT: So that takes care of, then, I assume, 15.2.(E); is that correct?

MS. BEAULIEU: That is correct, if as Mr. Porter just indicated, the interpretation will change. We request that the wording of the ordinance be changed, not just the interpretation of the city.

THE COURT: Absolutely. That anyone seeking to be in compliance with the city ordinance would reasonably

read it the same way that you and I have read it and Officer Brandenburg have read it.

MR. PORTER: If I might, I want the record to be clear.

The city is not saying that – and I am concerned that maybe I haven't stated it properly. What the city says is where the court interprets the language political signs shall only be located in a residential zoning, that will be changed to clearly state without a permit.

The city –

THE COURT: I want the word "only" taken out of there.

MR. PORTER: Right. As long as – I just don't want the court to think that we are saying we are going to allow political signs any number at any place.

THE COURT: We haven't gotten to that part yet.

MR. PORTER: I wanted us to be sure that you didn't interpret that is what we were saying.

THE COURT: But I think the only way to make it clear that political signs are not limited to only being displayed in residential sections is to remove the word "only".

MR. PORTER: We don't have a problem –

THE COURT: Or change it to – to modify a different part of the sentence. But when it says can only be displayed in a residential section, that is pretty clear that they can only be displayed in a residential section. I understand you say that some people in the city interpret it differently, that is why it needs to be changed so that it's clear that political signs are not relegated to only residential areas.

MR. PORTER: Exactly. But the other areas would be with a permit.

THE COURT: We will get to that section. We are talking about Section 15.2.(E) right now.

MR. PORTER: Right.

THE COURT: All right. Ms. Beaulieu, do you have any other statements concerning the challenge to the ordinance?

MS. BEAULIUE: Yes, Your Honor, I do. There is evidence before this court, including in my affidavit, and its evidentiary submissions submitted by the defendant that my commercial building is zoned B-5.

Under that zoning, I am only permitted one commercial sign on my building. That commercial sign at this moment contains the word, Donna J. Beaulieu, attorney at law, which advertises –

THE COURT: Let's clarify that. If I understand the ordinance, it doesn't specifically limit it to commercial signs, just one sign.

MS. BEAULIEU: Mine happens to be of that nature.

THE COURT: Right. But under the B-5 zoning, there can only be one sign on business property, right?

MS. BEAULIEU: Correct. As such –

THE COURT: Can you cite me, for the record, to the portion of the ordinance that refers to that?

MS. BEAULIEU: Appears to be A-1.

THE COURT: For the record, that reads Section 8.0, signs permitted in the B-5 district, (a), business or other use, (1), maximum number, one, per facing street.

Is that what we are addressing?

MS. BEAULIEU: That's correct. That being said, Your Honor, the defendants have argued that I can place another sign – well, actually, the defendants have argued that I can change my sign –

THE COURT: Substitute it under Section 12.0 –

MS. BEAULIEU: I can substitute the speech of my business sign to a political campaign sign.

And my argument to that is, number one, it's requiring a permit. Because the U.S. Supreme Court has put the highest burden or has put the highest protection on

political speech, to require me to request permission to express political speech is a prior restraint of that speech.

THE COURT: Do you have any authority to support your position that the city cannot require a permit for posting of political speech in the business district?

MS. BEAULIEU: Could you ask that again, Your Honor?

THE COURT: Do you have any authority to support your position that the city cannot require a permit for posting of political speech?

MS. BEAULIEU: There is in my brief, Your Honor.

THE COURT: I missed that. If it's in there, please cite it to me. The reason I ask is because the case I cited to you when were in chambers earlier was the Sugarman case which, in fact, of course, it's from the Southern District of New York, but it upheld requirement of permit for political speech when it also required permits for other temporary signs.

MS. BEAULIEU: Let me back up a little bit then, Your Honor, if I may. Two things I would like to state about the permit requirement that the city – all right. Under the ordinance, a temporary sign under Section 15.3(F)3, it clearly states that each commercial lot, which would include my building, building or tenant space may have one real estate for sale or for sent sign provided such sign is located on the subject lot or premises and does not exceed thirty-two square feet of sign space area. The sign shall be removed when the property or premises is sold or rented. That section allows commercial property owner to put another sign on their building, one that says for sale, one that says for rent.

Under the B-5 zoning ordinance that I'm under, I'm the commercial lot, I would be permitted to put a for sale or a for sent sign on my building, that would be one way that I would be able to put one extra sign above and beyond the requirement of B-5 zoning.

However, that specific section only allows for sale or for rent. If I were to change it to for judge, Donna Beaulieu for circuit judge, I wouldn't be permitted to do it.

Under that section, I am allowed to put a thirty-two square foot sign that says for sale or for rent, but I could not change that language without requesting a permit from the city.

The only way that they can make a determination, the only way a determination can be made as to whether a permit would be required is the wording of the sign.

THE COURT: You are arguing it's not content-neutral. I don't think we have to get to the question of whether the burden on political speech is content-neutral or content-based, and there is a significant amount of confusion, as far as I'm concerned, in the cases out there that look at what constitutes content-based speech, is it merely that you have to read the sign to see what kind it is to determine where it can go. Some courts say that makes it a content-

based ordinance, others say no, it's not, because it doesn't discriminate based upon what the sign actually says, just the kind of speech that it is.

So I don't think that we have to go there under the language from the McIntyre case from the Supreme Court that I cited earlier, if you can show that the law burdens core political speech, then we apply the exacting scrutiny test.

But I understand, I think, your argument that by allowing an additional sign in a B-5 commerical district of a commercial nature that says for sale or for rent, without allowing a political sign in that same district, that we are looking at an ordinance that burdens political speech. The city has argued repeatedly that by exempting political signs in residential areas on property occupied by or a dwelling on it, that the City has given greater preference to political speech. I think you example here demonstrates that that is not the case.

MS. BEAULIEU: I have also tried to wrap my mind around the argument that at some point I had political signs across from the city hall on a piece of property, several pieces of property that were actually zoned B-3 but they contained residential homes.

I have removed those signs based on my reading of the ordinance, which as we have stated, if the property was zoned B-3, it's not a residentially owned area, I removed them and I did that.

The defendant has pointed out, however, that there are certain sections of the ordinance, specifically property zoned B-2 and B-3 and B-3 is the zoning of the houses, of the properties that I have removed my signs from, that I could still put my signs there and I would not need a permit.

I am still - - I have having trouble, I think, trying to understand that argument. I think a response that I would have to that would be, okay, if it's B-2 and B-3, especially here, obviously there is a piece of property here that when it

was zoned there was a home and it's going to stay a home until somebody changes it. If there is a piece of property right next to it that is zoned B-3 and it's a business, I would never be able to put my sign there without a permit, and it's treated differently.

THE COURT: Okay.

MS. BEAULIEU: And also, tow, because from my reading of the statute, I may be wrong, according to my reading of the ordinance, this only applies to B-2 and B-3, this would never be a chance for an M class property or any other to hold that significance.

THE COURT: In telling you that you could put your signs across the street from your office where there is a residential dwelling in a commercial district, did anyone from the city point you to anything in the ordinance that specifically allows that?

MS. BEAULIEU: No, they did not. The first that I knew about it was during this litigation. And I still - -

THE COURT: And during your deposition.

MS. BEAULIEU: It was in our meeting in chambers last time was the first I heard of it.

THE COURT: Okay.

MS. BEAULIEU: To me, it's still relegating it to residential property. The city is still saying, yeah, you can put it in there, but you can't put it in the gas station next door without a permit.

THE COURT: All right.

MS. BEAULIEU: I think the main thing is that it seems to me that I cannot put a political campaign sign without going through some type of filter that the city has put up. I must either get a permit, I must either put it in a certain area, but I can't just put it on my building if I want to. I have to - - they have offered me - - that is the thing, too, in the letter they wrote to me to try to see if we could work something out, it seems like they were offering, they were saying, our position is going to stay the same, we will treat

you a little bit differently. That doesn't solve the problems that we have because I'm not the only one affected. And if I want to run again in two years or somebody else wants to run without this sign ordinance being changed, somebody else is going to face the same problems that I have.

THE COURT: Also, Ms. Beaulieu, this is not just a situation where I assume you want to put a political sign in from of your office, I assume you would like to be allowed to put political signs in from of other businesses that are in the business zoning of the city.

MS. BEAULIEU: Correct.

THE COURT: But to be able to do that, under the city's interpretation of its ordinance or under the language that allows for substitution, you would have to convince a business owner to put your political sign on that business owner's business sign or there would be no other way to put a political sign in the business district. Is that the way it's been explained to you?

MS. BEAULIEU: Yes. And the way - - another thing that holds that hand is that a residential property owner can withdraw their permission. I have to get their permission to do that, which I understand that.

But I am still not being able to use my commercial property to put a sign that does not affect my business sign. My client, people that know me, people that want to know about me, could come to my office, they would say Donna Beaulieu, attorney at law, that is where I am, a sign there, also espousing my campaign.

THE COURT: Anything else? Mr. Porter, I think you would like to respond.

MR. PORTER: We are here for a hearing on the merits. And I have a witness that I would like to put on.

THE COURT: You may do that.

MR. PORTER: I call Dr. Eric Kelly.

THE COURT: Wait a minute. Did not my order setting this for hearing require that any evidence that was to

be presented was to be presented by affidavits and that the affiants would be present for cross-examination?

MR. PORTER: Your Honor, in talking to Mr. Goldman, it was our understanding that that applied to the - - for the preliminary hearing as to the plaintiff in proving their case. And we didn't interpret it to apply for a hearing on the merits.

THE COURT: I think you are right. I apologize.

MR. PORTER: Dr. Kelly

DR. ERIC KELLY, SWORN

THE CLERK: State your name for the record.

THE WITNESS: Eric Damian Kelly, k-e-l-l-y.

THE CLERK: What city and state do you reside?

THE WITNESS: Muncie, Indiana.

MR. PORTER: Your Honor, if I might, I would like to put into evidence Dr. Kelly's curriculum vitae as an exhibit.

THE COURT: Any objections?

MS. BEAULIEU: If I may see it, Your Honor.

MR. PORTER: If I might, too. We have already submitted into the records notarized copies of the zoning ordinance and of the sign ordinance and I would like to make those part of this record.

THE COURT: All right.

MR. PORTER: If that is appropriate. They are already in the record. I can give additional copies at this juncture.

THE COURT: Identify them by exhibit number to your submission so that it's clear what you're referring to. But they are already a part of the record.

MR. PORTER: They are Exhibit 1 and 2 in support of the defendant's brief in opposition to plaintiff's claim for declaratory injunctive relief. It was a filed on August the 11th.

THE COURT: All right. Thank you.

MRS. BEAULIEU: No objection to this, Your Honor.

MR. PORTER: We would like to put into evidence –

THE COURT: Let's have this marked as an exhibit, if you are offering it as an exhibit.

MR. PORTER: I was going to enter into evidence the other exhibits that we had filed. And for numbering purposes, I wanted them to be sequential.

THE COURT: They are already a part of the record. So you don't need to do that, unless you just want to make more paper for the file. You submitted eight exhibits previously; is that correct?

MR. PORTER: I believe so. I wanted to be sure those were entered into the record.

THE COURT: They are in the court file, they are part of the record. They have been reviewed by the Court.

DIRECT EXAMINATION

BY MR. PORTER:

Q. Dr. Kelly, we have your curriculum vitae that is in evidence here today --

THE COURT: It has not been admitted. It has not been marked as an exhibit. I have not admitted it. You have offered it, Ms. Beaulieu said she does not have an objection to it, but you have not marked it and given it an exhibit number for today's hearing and I have not admitted it into evidence yet.

MR. PORTER: We have it -- it's been marked as Defendant's Exhibit Number 1 for the hearing on this date.

THE COURT: All right.

MR. PORTER: We would offer it.

THE COURT: All right. You have two exhibit 1's? I thought you said you were going to do them sequentially.

MR. PORTER: We would like to make the next sequential number, I honestly don't know what it would be, since we have had multiple submissions.

THE COURT: All right. Maybe we can avoid any confusion. Admitted into evidence.

Q. Not to rehash what all appears in your resume, but how are you employed at the present time?

A. I have multiple jobs. I'm a professor of urban planning at Ball State University in Muncie, Indiana. I am a vice-president of Duncan Associates, it's a firm based in Austin, Texas that helps local government implement plans. And I also earn a good part of my living doing writing for a Lexis/Nexis company.

Q. Included in your curriculum vitae you have been published a number of times by recognized treatises and publishing services; have you not?

A. Yes. I am general editor of zoning and land use controls

which is a ten volume treatise published by Matthew Bender that we update three times a year.

Q. Have you been accepted as an expert witness in a number of cases, both in state and federal court?

A. I have.

Q. And you have testified as an expert in those cases, have you not?

A. I have.

Q. Are you considered to be an expert in the area of sign ordinances and zoning ordinances and such as the one that is before the court today?

A. I think that is ultimately up to the judge, but I spend a good deal of my time working on those subjects. I have helped local government to do sign ordinances for about twenty years. I published a technical report on the subject in 1989, tried to address some of the issues we are talking about today. And I work with a number of local governments on the issue of sign ordinance, that usually takes place in the

more general context, which is one of the specialties of our firm.

Q. In fact, you are the one that drafted the subject sign ordinance that we are here on today.

A. Well, I drafted amendments to the subject sign ordinance.

Our agreement was that it needed some clean up, we didn't want to go through and make massive policy changes in terms of the types of signs allowed, but yes, the current amendments I drafted, including some of the disputed language unfortunately.

Q. In making those changes, in your opinion, was one of the purposes there to comport with the present constitutional law as set by the Supreme Court in the circuit courts here in this country?

A. That was my understanding from you and the city officials that that was your intent and with your guidance, we tried to help do that.

Q. In your opinion is that a compelling interest to comport with the federal and state constitutional standards dealing with sign ordinances?

A. Two of the overwhelming issues that we had to deal with and the judge has correctly pointed out, this is confusing, is when I look at political sign cases, I usually look at Ladue. And the Ladue v. Gilleo case, the court spoke -- there is a lot of policy language there which may be dicta, but I looked at the policy language about the importance of allowing residents to express their opinions. Most of the political sign cases aren't from the perspective of the candidates, and in that sense this is a very different sort of case. That is why we have this provision specifically discriminating in favor of political signs in residential districts. I am listening to the judge carefully and I'm hearing that there is another perspective on this, but that was the compelling interest by carving out special treatment in an area that otherwise would not have allowed much sign, because my understanding was

that the courts do place very high value on that and we carved that out. We have also carved out special treatment for real estate signs because in the Willingboro case, the Supreme Court said you can't severely restrict real estate signs at least in residential zones. And their logic there was if you want to keep your neighborhoods populated, you have to let people notify others that there are places to live in or you might have a lot of vacancy. Most communities have carried that logic over into the commercial districts and also said, having a lot of vacant commercial sites is not good either, so we are going to pull out this additional category for special treatment in this commercial district. It was our intent that we carried over that substitution language that was relied on by the Northern District of Georgia in upholding the Atlanta sign ordinance, which I drafted, but our intent was that that would cover any loopholes. Certainly my intent in presenting it to counsel, I understand ultimately it says what it says, that the intent was that the substitution message

language would let someone take even a real estate sign and place a political message on it. That would be sort of an unusual scenario. But that was -- the intent was that the substitution of message language would apply very broadly. The Northern District of Georgia read it that way, I understand you are not, Your Honor, and I respect that, that will influence my future drafting.

THE COURT: Did the Northern District of Georgia case to which you are referring address the question of political speech on substitution of signs?

THE WITNESS: It did not get into that depth, no. But it did -- that was a specific -- that was an element, it was looking at metro media and looking at the validity of the ordinance and that was a very important element in upholding the ordinance.

Q. Is there anything in the system in the scheme that you drafted and was adopted that requires that the content of any message be included in the application process?

A. No. We made sure that there is nothing about what the sign says in the application process.

Q. 15.2.(E), again, gets back to the provision that we have discussed and in which the court has expressed some concern. And I think you previously touched on it, but it deals with the political signs. Can you explain to the court the purpose of putting that in there as it relates to the entire permit and sign system?

A. Again, that provision -- that is allowing additional signs in addition to all other signs that are permitted. And that would probably read better if you looked at it in an outline format, which I understand is difficult to do. But that is really four levels down in the outline, and that restrictive language about residential property was intended to be a subset of this extra signage, not an overall restriction on political message. I realize the court doesn't read it that way. And when an intelligent person misunderstands something I

drafted means I drafted it badly. I will certainly work with the city to fix it.

THE COURT: Do you also understand that the enforcement officer read it that way as well?

THE WITNESS: Yes, ma'am. I understand. No, there is no quarrel. It ought to be fixed. And, yeah, that ought to be clarified. If I may go forward just a little bit. I think the more difficult question that is faced here, the courts have made it clear that there cannot be significant restriction on political signs in residential districts. I think the issue about the handling of political signs in commercial districts is much more clear. There are few cases addressing that. And while clearly the city cannot discriminate against them, whether the city is required to, you know, simply remove any limitation in 15.2.E that refers to residential districts and say that any business can put up twenty political signs, I think, is a much more difficult issue. If the question is simply, if they

can have a temporary thirty-two square foot sign that abrogates the place for sale, can they also have a temporary thirty-two square foot sign promoting a candidate for office or seeking to impeach the mayor -- I think there is no question about that. Clearly one cannot discriminate against political signage.

I hear running throughout this the more difficult question of whether the city also has to allow just essentially an unlimited number of political signs gathered in a commercial district as a must in the residential districts.

Q. Dr. Kelly, are you aware that B-5 zoning district has been the focus of the plaintiff's concerns because that is where her building is located, a historical district zoning?

A. I'm not sure I realized that was the historic district. I apologize for not doing that.

Q. There has been some discussion about a concern about not being able to have political language either on the sign on her building. Is there anything in the zoning ordinance and

the sign ordinance that would prohibit political language on that sign?

A. No. The substitution of -- first of all --

THE COURT: On the one sign that advertises her business.

Q. Is there any, first of all, let me ask you this: Is there

any content-based, any type of review, any type of prohibition, any type of restraint in any part of this ordinance that is content-based?

A. Any prior review that is content-based, no.

THE COURT: Mr. Porter, I thought I stated earlier that I had gotten beyond the question of whether we are looking at content-based or content-neutral and we are looking at whether there is an undue burden on political speech regardless of content. Didn't I state that when we began this hearing?

MR. PORTER: You did.

THE COURT: We don't need to go into those kinds of questions.

MR. PORTER: Can I ask the court a question about that? Does that mean that we are not -- we are beyond even discussing whether it's content-neutral or not?

THE COURT: Yes, sir. It does.

MR. PORTER: That is not the standard.

THE COURT: I stated that the standard that this court is applying is the one set out by the Supreme Court in McIntyre which states when a law burdens core political speech, we apply the exacting scrutiny and we uphold the restriction only if it's narrowly tailored to serve an overriding state interest. That is the standard that the court is applying in this case. You don't have to get into the question of whether the ordinance is content-neutral or content-based.

If it burdens core political speech, which I believe it does, then this is the standard we are applying.

MR. PORTER: For purposes of the record, could I make an offer of proof concerning Dr. Kelly's testimony?

THE COURT: On what point?

MR. PORTER: On the issue of the content neutrality or content-based distinction.

THE COURT: If you want to be here all day, go ahead, Mr. Porter.

Q. Dr. Kelly, going back to my question, is there any way, any aspect of that sign ordinance which is any way based on content or restricts any message based on content?

A. Not for permitting purposes. But for other purposes within the ordinance, there are these sort of common sense distinctions including the two mandated by the Supreme Court dealing with political signs and real estate signs

separately. Those are not -- those do not require prior review.

Q. All right. Does the City of Alabaster have a substantial interest in regulating the signs in the commercial district as it does?

A. I think it's well accepted that the city has an interest in reducing clutter and confusion on the street because of the issue of traffic safety and the city has a substantial governmental issue in promoting aesthetics.

Q. Highway 31 that runs through the City of Alabaster, you are familiar with that main artery down through there?

A. Yes.

Q. Would you agree with me that there are substantial concerns from the standpoint of traffic, traffic safety, traffic speed, pedestrian safety, that there are crosswalks in the area, there are a number of sidewalks in the area, and lastly, from the aesthetic standpoint, general clutter, those are substantial interests of the city?

A. Yes.

Q. Would you agree with me that it's somewhat a dangerous area when you are exiting off of Highway 31 onto, I mean, Highway 65 onto 31 with a substantial reduction in speed and a substantial change in the appearance and the aesthetics along Highway 31?

A. Yes.

Q. And that is an important planning aspect that the city has taken into consideration in this ordinance?

A. Yes.

Q. I think you have already articulated your concern or your statement concerning Ladue versus City of Gilleo, wherein you indicated that political signs are entitled to special treatment. Would you agree with me that the treatment that the city has given political signs in residential areas meets that test and is permissible?

A. Yes. That allows an unlimited number of thirty-two square foot signs on an individual property for the purpose of promoting political candidates. The only other extra signage allowed in those same areas are real estate signs which can only be four square feet.

Q. And the Supreme Court in cases have indicated that those can be carved out, political signs, without violating any of the standards dealing with the sign ordinance; is that right?

A. I think they indicated that you have to protect political signage even when you don't protect others, which was the reason we included that section.

Q. Does the savings clause, Section 12, insure that there is no discrimination against noncommercial speech in this ordinance?

A. That was my intent in preparing it and submitting it to the city. I think the judge is going to get to decide that. And if not, we need to fix it because that was my intent in

presenting it to the city and that was the intent of the city council in adopting it.

THE COURT: The substitution of message provision?

THE WITNESS: Yes.

Q. Does the language of 15.(E)(2) unconstitutionally limit all political signs to residential districts?

A. Well, that was not my intent in drafting it, but I think it's been pointed out that my drafting can be improved. We will work with you to get that done.

Q. Would you agree with me that political messages are allowed wherever a sign is permitted and allowed?

A. That was our intent and we discussed that in the drafting process. I apologize to the court and the plaintiff if we didn't make that as clear as we should have.

Q. We heard earlier from the plaintiff the concerns, and I think the court touched on these, two different concerns as I

heard them. One was the ability to put a second sign, commercial sign, or a political speech sign, on the plaintiff's building in a B-5 zoning. Is there anything -- well, let me ask it this way. The savings clause, would that permit any message on the sign that is there?

A. Yes. That is my interpretation.

Q. Does the savings clause allow a message that would read Donna Beaulieu, attorney at law, including language Donna Beaulieu, candidate for circuit court?

A. That was certainly our intent in drafting it.

Q. All right. I think the court has raised a concern about the fact of if you went to an off premises sign that was permitted, that the owner of the premises either may charge the plaintiff a fee for advertising her political message, or would not allow her political message and that was some distinction given. Can you explain how the Alabaster sign ordinance meets constitutional muster in that regard?

A. There is a case Loretto v. Manhattan Teleprompter in which the -- it conceptually related -- the City of New York tried to give the cable television company permission to attach its cables to buildings going through the city, that there was no place else to put the cables. And the U.S. Supreme Court said that's an unconstitutional taking of private property. I don't think the City of Alabaster has any authority to tell private property owners that they have to allow any political candidate to erect signs on their property. I think always the political candidate will have to seek the permission of the property owner to use that property. And whether they charge or not is nothing I have anything to do with.

Q. Does this ordinance, in your opinion, only regulate the time, place and manner of expression?

A. That was the intent.

Q. And I believe you previously testified that it doesn't regulate the content of the expression at all; is that correct?

A. No. The intent of the content-based references were intended to describe types of signs because it's very difficult to describe a political sign and protect it without referring to its content.

Q. Concerning the signs that are permitted, are there alternatives, ample alternatives, channels of communication?

A. Well, ample is in the eye of the beholder. There are many alternatives. The City of Alabaster sign regulations are relatively liberal overall, they allow a good amount of signage. There are many other means besides signs to advertise.

Q. Does the ordinance in any way have -- in any form restrain the viewpoint of any message that one would want to put on the signs in the City of Alabaster?

A. No.

MR. PORTER: I believe that is all we have, Your Honor.

THE COURT: Thank you. May I ask a few questions?

MR. PORTER: Yes, ma'am.

THE COURT: Is it Dr. Kelly?

THE WITNESS: If that suits you, Your Honor. That is fine. I have an earned Ph.D. I ask my students to use Doctor, I'm pretty flexible in court.

THE COURT: If you have earned a Ph.D, you have earned the right to be called Doctor and I will address you that way, if you don't mind. Dr. Kelly, if I heard you correctly, I believe that you indicated that the law may not be quite as clear on restriction of political speech in commercial districts as it is in residential districts. Is that correct?

THE WITNESS: That isn't quite what I intended to say, Your Honor. I think the law is very clear that in residential districts, even if you don't allow any other signs at all, you have to allow political signs.

THE COURT: That is because the Supreme Court has recognized the supremacy, if you will, of political speech and a protection to be given to it.

THE WITNESS: Correct. From the perspective of the resident being able to communicate their perspectives. What I think is more -- there is no question that you cannot discriminate against political speech in commercial areas. I would never argue that. What I think is --

THE COURT: Is there anything in this ordinance that allows a business owner to place a temporary political sign on their property without substituting it for their commercial business sign?

THE WITNESS: No.

THE COURT: But the ordinance does allow a business owner to put another commercial sign which says for sale, a temporary sign on that property, correct?

THE WITNESS: Correct.

THE COURT: Is that not discrimination against

political speech?

THE WITNESS: If you don't believe that the substitution of message language solves that, yes. But the intent was that the substitution of messages would be a catch all that would cover those situations.

THE COURT: So is it the intent that if I can put a for sale sign in front of my business without a permit that I should also be allowed to substitute, instead of a for sale sign, a political sign?

THE WITNESS: That was our intent as a catch all situation. Now, there are some traps in that, Your Honor. Because for sale and for rent signs are supposed to be tied to the actual availability of the property. And they are supposed to come down when it's no longer available, so there is a time limit. All other temporary signs have time limits.

THE COURT: Right.

THE WITNESS: But at least in the Fourth Circuit, they have taken a very strong position that you can't put time limits on political signs

THE COURT: In other circuits they have allowed time limits on political signs, that they have to come down, if it's --

THE WITNESS: After an election.

THE COURT: -- for an election, has to come down after the election. Not before, but can restrict it to come down after.

THE WITNESS: As the president of the city council pointed out earlier, before the election -- he was just reelected -- before the election, it could be now for the 2008 election, so these can become essentially semi-permanent signs. One thing that happens in a residential area that doesn't always happen in a commercial area and doesn't happen with unoccupied property is that residents remove the clutter. After the election, most residents will take political

signs down from their yard, they don't want the clutter around anymore. A business owner may or may not do that and a vacant lot owner really is very unlikely to do that.

THE COURT: We are not talking about vacant lots. We are talking about --

THE WITNESS: Improved property limitation.

THE COURT: Yes. If I own a business and I want to put a political sign that supports a mayoral candidate or a judicial candidate or a presidential candidate on my business property, there is nothing in this zoning that would allow me to do that unless the people interpreting and enforcing the ordinance reads the substitution provision to allow me to substitute a political sign for a for sale sign.

THE WITNESS: That's correct, Your Honor.

THE COURT: Why is that not an undue burden on my ultimate supreme right of political speech?

THE WITNESS: Well, the intent was that the

substitution of language, the substitution of message language would work. If it doesn't, that is a burden. I'm not going to argue with you. May I ask you a question, though?

THE COURT: Are you aware that the city has interpreted its sign language not to allow a substitution of what in essence could be a for sale sign or a political sign?

THE WITNESS: We discussed that and it's my understanding they have corrected that. Obviously I was concerned about that.

THE COURT: You understand the court's concern.

THE WITNESS: Oh, yeah. My concern is not -- may I make a brief statement?

THE COURT: Yes.

THE WITNESS: My concern is not that, I think your thinking is very logical. My hope in being here is that you can deal with a scalpel rather than a sledge hammer to the extent you see fit, because I think the city has proceeded in

good faith to try to solve this problem and there are very real problems out there and there are people going after sign ordinances with a sledge hammer when a scalpel or a fly swatter would do. That is my real concern. In that respect, Your Honor, if I could just, you don't need to answer today, but I hope as you make a decision in this, if you say that they must allow political signs in the commercial district, it would be nice if we had some kind of answer to the question, okay, since they allow one real estate sign, does that mean they only have to allow one political sign or an unlimited number of political signs. Since they only allow temporary signs for sixty days, can they put a sixty day limit on the temporary political signs in commercial districts as they do on other temporary signs in commercial districts or do those also have to be unlimited.

THE COURT: As I read the few cases that I have been able to find that deal with political speech, not the cases that have been cited to me dealing with commercial speech,

which are treated differently, but the cases that I have read, and I cited to defense counsel and to plaintiff the Sugarman case that looked at a variety of ordinances that upheld some and struck down others, that court upheld ordinances that treated all temporary signs the same. The problem I see with this ordinance is that it does not allow for temporary signage in the business district other than commercial for sale signs. And that, in my opinion, discriminates against political speech. It gives higher concern for commercial speech than is due political speech and that is the reverse of what the Supreme Court has said. So if there is a way to revise the ordinance to treat temporary signage in the business district the same, I think it would probably pass constitutional muster based upon the few cases that I have seen looking at that. I don't think there has to be an unlimited number of political signs in the business district. But as it currently reads, there are none allowed. It's certainly not the way it's

interpreted by the enforcement people. I think there can be a reasonable restriction and time, at least, on the end of a political campaign. But I don't think the statute, as it stands, and as it's interpreted, passes constitutional muster because it does not allow for the owner of a business or the proprietor of a business to express political speech on that property. That is where my concern is. I don't know if that helps you in understanding the scalpel as opposed to the sledge hammer, but I do understand the concerns of the City of Alabaster and of other cities in limiting the proliferation of signage. I recognize that there is a state interest. I am not sure that the prohibition of all political signage in the business district is supported by an overriding state interest. I don't think it is narrowly tailored. So that is where I am coming. Now, I have not allowed Ms. Beaulieu to ask any questions, I don't know that you have any.

MS. BEAULIEU: I don't have any.

THE COURT: Mr. Porter, always after I ask questions I allow the lawyers to ask additional questions.

THE WITNESS: May I make one brief statement, Your Honor? If you were to sever the "only in a residential district" language for now, that would probably solve Ms. Beaulieu's problem. The city might want to fix it to impose some time and number limits in the commercial districts. But that would then apply that political sign language without a permit language citywide and would include all the districts and that would certainly be a scalpel rather than a sledge hammer. You may or may not want my suggestion on that. I am familiar with the ordinance and I have looked at it with that in mind, and it would do no other harm to the structure of the ordinance.

THE COURT: I would be glad to allow the city to come up with whatever language to revise its ordinance. My order, I think, would be limited to prohibiting the city from enforcing a limitation to only residential areas and

would -- what I would propose, require the city to allow political signs anywhere it allows temporary signs, which would include the for sale signs that are allowed in the business district. I think that would be fairly narrow. Ms. Beaulieu, would that accomplish the purpose that brought you into this court?

MS. BEAULIEU: Yes, Your Honor.

THE COURT: If I am not mistaken, the provision of temporary sign for commercial allows one. So there would be one sign not to exceed thirty-two square feet in the business district. I don't think that would limit the, you know, I can see somebody building a thirty-two foot sign and stapling several political signs to that for expression of political views and that may be something that the city might want to address later. But that would be the extent of my order now. I don't think it's my job to redraft the language of the ordinance. But I do think that it's my job to ensure that

political speech is given the highest protection under the First Amendment that it's entitled to and to see that political speech is not treated with less regard than commercial speech and that is the problem that I have with the ordinance.

MR. PORTER: Could I ask him one question?

Q. Concerning the court's statements and the fact that -- your views on this, if in fact the savings clause Section 12 was interpreted and applied as it was intended, would that not have the affect of allowing free substitution on those signs without a proliferation of temporary signs?

A. That was the intent. But I'm hearing what the judge says and I think there is another way to solve this. And I think we can do that very quickly and get it back to city council.

Q. Would you agree that or disagree with the fact that on temporary signs, even one per a zoning district is allowed or one per parcel is allowed, that would affect the, not only the safety, but also the aesthetics that you are, which is a compelling interest of the city?

A. The courts have held that is a substantial interest. Whether it's compelling, I'm sorry, Mr. Porter, I'm not sure I would quite go to compelling on that with one more sign. Fifteen more signs becomes compelling. There is a point at which it is terribly distracting. I am not sure -- I have trouble going one more sign per property being compelling.

Q. But fifteen, a greater number would be a problem?

A. Oh, yeah. At some point it is compelling. It is so distracting. I mean, there is a county in Florida where the county commissioners tell stories, there is so much sign clutter, he tells stories about little old ladies stopping their Cadillacs in the middle of the driving lane to stop to be able to read the sign. That is a true hazard.

THE COURT: I understand that. What I am suggesting and what I am ordering or will order is that the political signs be treated in the business district the same as the one real estate for sale sign temporary that is allowed without a permit under the ordinance as it is written. That is

treating political speech the same as commercial speech. It's not treating it any better, it's treating it the same. And that may not be sufficient, but I think that that will do at this point.

MR. PORTER: Again, just for the record, the city's only point on that would be that the savings clause would allow that, just what Your Honor is proposing. And that, for the record, is our interpretation, that is our application of it.

THE COURT: For the record, that is the first time that the city has made that position. When we were here before, the substitution clause was to allow her to substitute her political message on her existing permitted commercial sign. And the argument at that point was that she could get a permit to put up a sign, not that she would be allowed to substitute a political yard sign for a for sale yard sign under the substitution provision. I understand that that is how you are wanting to interpret it today. I want you to understand

that is not how you were arguing it the last time we were in here.

MR. PORTER: The only thing I would say that I have been uniform, Your Honor, in saying that the savings clause allows for any language to appear wherever a sign is. That is our viewpoint. That has been the consistent viewpoint. If we related anything else, it wasn't intentional.

THE COURT: Do you understand what my order is, Mr. Porter?

MR. PORTER: Yes, ma'am.

THE COURT: All right. It will probably be tomorrow before a written order is out. My ruling from the bench is that the ordinance as written and as applied is unconstitutional because it's unconstitutional burden on political speech in the commercial area, and that political speech from now on is to be treated at least as equal as commercial speech and that businesses are to

be allowed to have one additional political sign as they would be allowed to have one additional real estate sign on a temporary basis without a permit. Okay.

MR. PORTER: Anything else that Your Honor covers in her order other than those applications?

THE COURT: That is what I intend my order to be.

MR. PORTER: Thank you.

CERTIFICATE

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-referenced matter.

_____ _____

Teresa Roberson, RPR, RMR DATE